Docket for 02-9410

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| No. 02-9410 | Status: GRANTED |
| Title: | Michael D. Crawford, Petitioner |
| | v. |
| | Washington |
| Docketed: | March 10, 2003 |
| Lower Ct: | Supreme Court of Washington |
| Case Nos.: | (71683-8) |
| Decision Date: | September 26, 2002 |
| Rehearing Denied: | December 12, 2002 |

| ~~Date~~ | ~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~ |
|---|---|
| Mar 10 2003 | Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due April 9, 2003) |
| Mar 27 2003 | Waiver of right of respondent Washington to respond filed. |
| Apr 11 2003 | Response Requested . (Due May 12, 2003) |
| May 8 2003 | Response to petition from respondent Washington filed. |
| May 12 2003 | Reply of petitioner Michael D. Crawford filed. |
| Jun 9 2003 | Petition GRANTED. |
| Jun 30 2003 | Motion to appoint counsel for petitioner Michael D. Crawford. |
| Jul 16 2003 | Motion DISTRIBUTED for Conference of September 29, 2003. |
| Jul 24 2003 | Motion for leave to file amici brief filed by National Association of Criminal Defense Lawyers, et al. |
| Jul 24 2003 | Motion for leave to file amicus brief filed by Sherman J. Clark, et al. |
| Jul 24 2003 | Brief of petitioner Michael D. Crawford filed. |
| Jul 24 2003 | Joint appendix filed. |
| Aug 19 2003 | CIRCULATED. |
| Aug 19 2003 | SET FOR ARGUMENT Monday November 10, 2003. |
| Aug 21 2003 | Extension of time within which to file respondent's brief on the merits to and including September 22, 2003. |
| Aug 25 2003 | Motion for leave to file amicus brief filed by National Association of Criminal Defense Lawyers, et al. GRANTED. |
| Aug 25 2003 | Motion for leave to file amicus brief filed by Sherman J. Clark, et al. GRANTED. |
| Sep 17 2003 | Record received from the Supreme Court of Washington. (1 folder) |
| Sep 17 2003 | Record received from the Thurston County Superior Court. (1 folder) |
| Sep 22 2003 | Brief amicus curiae of United States filed. |
| Sep 22 2003 | Brief of respondent Washington in opposition filed. |
| Oct 1 2003 | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. |
| Oct 6 2003 | Motion to appoint counsel filed by petitioner GRANTED. Jeffrey L. Fisher, Esquire, of Seattle, Washington is appointed to serve as counsel for petitioner in this case. |
| Oct 7 2003 | Reply of petitioner Michael D. Crawford filed. (Distributed) |
| Oct 20 2003 | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. |
| Nov 10 2003 | Argued. For Petitioner: Jeffrey L. Fisher. For the United States, as amicus curiae, Michael |

R. Dreeben, Deputy Solicitor General, Department of Justice, Washington, DC. For Respondent: Steven C. Sherman, Senior Deputy Prosecuting Attorney, Olympia, Wash.

02-9410

No. 02-____

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

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MAR 10 2003

MICHAEL D. CRAWFORD,

*Petitioner,*

v.

STATE OF WASHINGTON,

*Respondent.*

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On Petition for a Writ of Certiorari
to the Supreme Court of Washington

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# PETITION FOR A WRIT OF CERTIORARI

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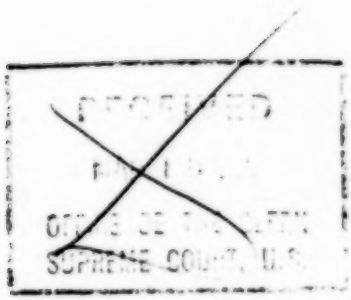

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## QUESTIONS PRESENTED

I. Whether the Confrontation Clause of the Sixth Amendment permits the admission against a criminal defendant of a custodial statement by a potential accomplice on the ground that parts of the statement "interlock" with the defendant's custodial statement.

II. Whether this Court should reevaluate Confrontation Clause framework established in *Ohio v. Roberts*, 448 U.S. 56 (1980), and hold that the Clause unequivocally prohibits the admission of out-of-court statements insofar as they are contained in "testimonial" materials, such as tape-recorded custodial statements.

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**PETITION FOR A WRIT OF CERTIORARI**

Petitioner Michael D. Crawford petitions for a writ of certiorari to review the judgment of the Washington Supreme Court decision in this case.

**OPINIONS BELOW**

The opinion of the Washington Supreme Court (Pet. App. 1a-9a) is published at *State v. Crawford*, No. 54 P.3d 656 (Wash. 2002). The opinion of the Washington Court of Appeals (Pet. App. 10a-16a) was unpublished but is reported at 107 Wn. App. 1025 and 2001 WL 850119 (Wash. App. 2001).

**JURISDICTION**

The Washington Supreme Court issued its decision in this case on September 26, 2002, and denied Petitioner's timely petition for rehearing on December 12, 2002 (App. 17a). This Court has jurisdiction under 28 U.S.C. §1257(a).

**RELEVANT CONSTITUTIONAL PROVISION**

The Sixth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

**STATEMENT OF THE CASE**

This case, which involves the admission of a tape-recorded custodial statement by a potential accomplice against a criminal defendant, raises a Confrontation Clause issue that has divided the state and federal courts and presents this Court with an opportunity to reexamine the Clause to bring it back in line with its historical and textual underpinnings.

1. On August 5, 1999, Petitioner Michael D. Crawford and his wife Sylvia, at Sylvia's urging, went to the apartment Rubin Richard Kenneth Lee. An argument ensued, and Petitioner eventually stabbed Lee and injured him. Petitioner received a cut on his hand.

That night, the police questioned both Petitioner and Sylvia at the police station. Each gave two separate statements, all of which the police tape-recorded. Both of Petitioner's and Sylvia's first statements contained similar and general stories: Petitioner briefly left Lee's apartment; he returned to find Lee making sexual advances toward Sylvia; and Lee was stabbed. Several hours later, Petitioner and Sylvia gave their second, more detailed statements. They said that Lee actually had sexually assaulted Sylvia several weeks earlier. This time, however, the statements differed from each other somewhat. "[T]he main distinguishing factor in these second statements was that [Petitioner] alluded that Lee may have had something in his hand *when* [Petitioner] stabbed Lee, while Sylvia implied that Lee may have grabbed for something *after* [Petitioner] stabbed Lee." App. 3a (emphasis added). (The full text of the relevant portions of these statements is reproduced at App. 14a n.2.) Sylvia also added that Petitioner had been "infuriated," "enraged," and "past tipsy," and she stated that Petitioner had said before the incident that Lee "deserves an ass whoopin'." App. 12a.

The State filed an information against Petitioner for first degree assault with a deadly weapon. Although Sylvia was a "potential accomplice" because she "showed [Petitioner] where to find Lee[,] was present through the duration of the violent encounter, . . . walked away from the stabbing with [Petitioner] and did not turn to the police when she had the opportunity," App. 7a, the State declined to press charges against her.

The key issue at Petitioner's trial was whether he acted in self-defense. Petitioner invoked Washington's marital privilege statute to prevent Sylvia from testifying. The State, however, offered, and the trial court admitted, Sylvia's second statement as evidence that Lee reached for a weapon only *after* Petitioner stabbed him. The State also introduced Sylvia's first statement to argue that Petitioner and Sylvia initially lied about the circumstances that led up to the stabbing. App. 11a. The jury found Petitioner guilty, and on November 19, 1999, the court sentenced him to 150 months in prison.



2. On appeal, the Washington Court of Appeals reversed Petitioner's conviction on the ground that the admission of Sylvia's statements violated the Confrontation Clause. Applying a nine-part test "to determine whether an out-of-court statement satisfies the reliability prong of" this Court's interpretation of the Confrontation Clause in *Ohio v. Roberts*, 448 U.S. 56 (1980), the court of appeals held that Sylvia's second statement was "plainly untrustworthy," App. 15a, because: Sylvia had a motive to lie; Sylvia's giving two different versions of her statement within four hours "does not suggest truthfulness"; Sylvia's statement was not spontaneous, but rather was given under mandatory police questioning; the statement described past events; and "cross-examination could reveal that she lacked knowledge of what happened" because "Sylvia stated that she shut her eyes during the stabbing." App. 13a. The court of appeals added that although the Washington Supreme Court held in *State v. Rice*, 844 P.2d 416 (1993), that an accomplice's confession could be deemed reliable if it "interlocked" with the defendant's confession, "that reasoning does not apply in this case" because Petitioner's and Sylvia's statements "differ regarding whether Lee was armed when [Petitioner] stabbed him." App. 14a. Finally, the court of appeals held that this Court's decision in *Lilly v. Virginia*, 527 U.S. 116 (1999), "is on point in this case" and requires the exclusion of Sylvia's statement because that case, like this one, involved custodial statements by a non-testifying accomplice that incriminated the defendant. App. 15a.

The court of appeals next held that Sylvia's first statement was erroneously admitted because, as evidence of supposed fabrication, "it is relevant only if the second statement is admitted." App. 11a, 15a. Lastly, the court of appeals concluded that the admission of Sylvia's statements was not harmless because "Sylvia's second statement refutes [Petitioner's] claim of self-defense" and sends the "overwhelming message that the jury cannot trust [Petitioner's story]." App. 15a.

Chief Judge Armstrong dissented. He argued that Sylvia's second statement was admissible because it "interlocked" with Petitioner's statements. In the dissent's view,

"even if we read Sylvia's statement as reporting that Lee reached for something after the stabbing, the statements are still the same in one essential fact: neither [Petitioner] nor Sylvia clearly stated that Lee had a weapon in hand from which [Petitioner] was simply defending himself. And it is this omission by both that interlocks the statements and makes Sylvia's statement reliable." App. 16a.

3. The Washington Supreme Court granted the State's petition for discretionary review, reversed and reinstated Petition's conviction. After confirming that the declarant in this case was "unavailable" to testify as a matter of state law, the Court stated that out-of-court statements offered against a criminal defendant are admissible under the Confrontation Clause if they have "particularized guarantees of trustworthiness" or if they "interlock" with the defendant's statements to the police. App. 6a. Without addressing the "particularized guarantees" test or the *Lilly* decision, the Court adopted the reasoning from the dissent in the court of appeals and held that Sylvia's second statement was admissible solely because it "appear[ed] to overlap," or "interlocked," with Petitioner's custodial statement. App. 8a. Because both statements "are ambiguous as to whether Lee ever actually possessed a weapon," the Court concluded that the "admission of Sylvia's statement satisfies the requirement of reliability under the confrontation clause." App. 9a.

4. Petitioner timely sought rehearing of this decision, but the Supreme Court denied this motion without comment. App. 17a.



## REASONS FOR GRANTING THE WRIT

1. State and federal courts, including states' highest courts, are divided six-to-four concerning whether a potential accomplice's custodial statement is admissible against a criminal defendant on the basis that parts of it "interlock" with a custodial statement by the defendant. This Court should review the Washington Supreme Court's decision in this case – which holds that the Confrontation Clause allows accomplices' custodial statements to be admissible on this basis – to resolve this conflict because the admissibility of such evidence is a critical issue in criminal trials across the Nation and the Washington Supreme Court's rule is incorrect.

2. Indeed, the split of authority concerning interlocking custodial statements is endemic of the need to reexamine the Confrontation Clause in a more fundamental manner. Several of this Court's Justices, as well as leading scholars and the Solicitor General of the United States, recently have urged this Court to reevaluate the framework established in *Ohio v. Roberts,* 448 U.S. 56 (1980), which links the Confrontation Clause with ordinary hearsay law and makes any extrajudicial statement admissible if it falls within a firmly rooted hearsay exception or a court determines that it has "particularized guarantees of trustworthiness." *Id.* at 65. This Court should undertake such an evaluation here and hold, in accordance with these Justices' suggestions, that the Confrontation Clause erects a per se rule that out-of-court statements that are contained in "testimonial" materials, such as tape-recorded custodial confessions, are inadmissible against criminal defendants. This modification would not require this Court to overrule any of its prior holdings, but it would greatly simplify applications of the Confrontation Clause, deconstitutionalize hearsay law, and bring the Confrontation Clause back in line with its textual and historical underpinnings.

## I. THIS COURT SHOULD RESOLVE THE SPLIT OF AUTHORITY REGARDING WHETHER A POTENTIAL ACCOMPLICE'S CUSTODIAL CONFESSION IS ADMISSIBLE AGAINST A CRIMINAL DEFENDANT ON THE BASIS THAT IT "INTERLOCKS" WITH A CUSTODIAL STATEMENT BY THE DEFENDANT.

### A. State and Federal Courts, Including Several of the States' Highest Courts, Are Divided on this Issue.

Under the framework that this Court has established in *Ohio v. Roberts*, 448 U.S. 56 (1980), and its progeny, an out-of-court statement may be admitted into evidence against the accused, consistent with the Confrontation Clause, only if (i) the statement falls within a firmly rooted hearsay exception or (ii) "particularized guarantees of trustworthiness" establish that the statement is otherwise sufficiently reliable that cross-examination would be of marginal utility. *Id.* at 65; *accord Lilly v. Virginia*, 527 U.S. 116, 124-25 (1999) (plurality opinion). In *Lee v. Illinois*, 476 U.S. 530 (1986), this Court held that the Confrontation Clause barred the admission of out of court statement very much like the one at issue here – a custodial confession by an accomplice that incriminated the defendant – because the statement neither fell within a firmly rooted hearsay exception nor contained particularized guarantees of trustworthiness. In analyzing the latter issue, this Court "reject[ed]" the state's argument that the accomplice's custodial statement was trustworthy because it "'interlock[ed]' on some points" with the defendant's confession, but it noted that an accomplice's statement that "thoroughly" interlocked with a defendant's might contain sufficient guarantees of trustworthiness to allow its admission at trail. *Id.* at 545-46. In *Cruz v. New York*, 481 U.S. 186 (1987), this Court similarly held that an accomplice's interlocking confession was not admissible in a joint trial involving the accomplice, who refused to testify, and another defendant. But, citing *Lee*, this Court left open the possibility that evidence of interlock "may be relevant" to a Confrontation Clause reliability inquiry under other circumstances. *Id.* at 192-93.

Three years later, in *Idaho v. Wright*, 497 U.S. 805 (1990), this Court again addressed the "particularized guarantees" prong of confrontation law. Ruling that an out-



of-court statement by an alleged victim of child abuse was inadmissible, this Court rejected the state's argument that evidence that corroborated the declarant's statement was relevant to the "particularized guarantees" inquiry. This Court explained:

> [T]he relevant circumstances include *only* those that surround the making of the statement and that render the declarant particularly worthy of belief. . . .
>
> . . . .
>
> [H]earsay evidence used to convict a defendant must possess indicia of reliability *by virtue of its inherent trustworthiness, not by reference to other evidence at trial.*

*Id.* at 819, 822 (emphasis added). This Court added that "although we considered in *Lee v. Illinois* the 'interlocking' nature of a codefendant's and a defendant's confessions to determine whether the codefendant's confession was sufficiently trustworthy for confrontation purposes, we declined to rely on corroborative physical evidence and indeed rejected the 'interlock' theory in that case." *Id.* at 824.

Since the *Wright* decision, state and federal courts, including states' highest courts, have split regarding whether an accomplice's custodial confession may satisfy the Confrontation Clause's "particularized guarantees" inquiry on the basis that it "interlocks" with the defendant's custodial statement. In this case, the Washington Supreme Court reaffirmed its earlier decisions in *State v. Rice*, 844 P.2d 416 (1993), and *State v. St. Pierre*, 759 P.2d 383 (1988), which held that an accomplice's confession satisfies *Roberts*' "particularized guarantees" test when it "interlock[s] with the defendant's own confession." App. 8a. In *Rice*, the Washington Supreme Court "admitted[] that the United States Supreme Court in *Wright* has indicated that corroborating evidence generally is not relevant for the trustworthiness inquiry." 844 P.2d at 427 n.5. But the Washington Supreme Court nonetheless surmised that this Court in *Wright* "did not reject interlocking confessions as a basis for establishing reliability. . . . It appears to have only rejected the use of corroborating *physical* evidence to establish reliability." *Id.* (internal citation omitted).

Courts in three other jurisdictions have reached the same conclusion as the Washington Supreme Court – *i.e.*, that "a defendant's interlocking confession, where one exists, may appropriately be considered in assessing the reliability of the accomplice's statement." *Rankins v. Commonwealth*, 523 S.E.2d 524, 531 & n.8 (Va. App. 2000); *see also Bass v. Commonwealth*, 523 S.E.2d 534, 540 (Va. App. 2000) ("[T]he Supreme Court in *Wright* did not reject the use of the interlocking character of codefendant confessions as probative of their reliability, but merely declined to rely on the use of corroborative physical evidence in applying *Lee*'s analysis.") (internal quotation marks omitted); *United States v. Hansen*, 36 M.J. 599, 607 (U.S.A.F. 1992) ("[W]e do not believe *Wright* precludes, in all cases, looking to an accused's confession or admissions when assessing the reliability of a hearsay statement"; "[w]e do not believe [trial court] committed error" in admitting accomplice confession on basis that it "interlock[ed] with defendant's admission to investigators."); *State v. Sanchez*, 797 P.2d 703, 707 (Ariz. App. 1990) (particularized guarantees inquiry "includes the other defendants' statements and the extent to which they 'interlock' with the confessions of the [defendants] they are offered against").

In contrast, six other courts – including the Supreme Courts of Colorado, Florida, and Michigan, and the Maryland Court of Appeals (the highest court in Maryland) – have reached the directly opposite conclusion as the Washington Supreme Court did in this case. The Michigan Supreme Court, for example, has held that "*Wright* specifically rejected reliance on either corroborative physical evidence, hearsay statements, or trial testimony, . . . and thus clearly overruled the dicta in both *Lee* and *Cruz* regarding reliance on the 'interlocking' consistency or corroboration of confessions." *People v. Watkins*, 475 N.W.2d 727, 746 (Mich. 1991). The other states' highest courts have employed similar reasoning, as have other state and federal courts. *See People v. Farrell*, 34 P.3d 401, 406 (Colo. 2001) (refusing to consider whether "Defendant's interlocking statements" established reliability of accomplice's confession because "[i]n deciding



whether [such a statement] bears the particularized guarantees of trustworthiness necessary to justify its admission," the statement must "possess indicia of reliability based on inherent trustworthiness, not based on other evidence at trial"); *Franqui v. State*, 699 So.2d 1312, 1319 (Fla. 1997) ("[T]he bottom line of *Wright* is that the interlocking nature of the confessions cannot provide a basis upon which to determine whether there are sufficient indicia of reliability to introduce and codefendant's hearsay confession as substantive evidence of the defendant's guilt."); *Simmons v. State*, 636 A.2d 463, 469-70 (Md. 1994) (While "it was once thought that . . . [t]he interlocking nature or meshing of the codefendant's and defendant's statements could be considered in determining whether the hearsay statement enjoyed particularized guarantees of trustworthiness, . . . [i]n *Wright*, the Supreme Court jettisoned such use of corroborative evidence.") (internal quotation and citation omitted); *Miller v. Miller*, 784 F. Supp. 390, 396 (E.D. Mich.) ("[T]he interlocking nature of Jordan's and Petitioner's confessions cannot be used to 'bootstrap' Jordan's [statements] to trustworthiness. The trustworthiness inquiry is limited to the totality of the circumstances that surround the making of Jordan's statements . . . ."), *aff'd* 983 F.2d 1067 (6th Cir. 1992) (table); *State v. Harris*, 739 So.2d 312, 316-17 (La. App. 1999) ("the Court noted [in *Wright*] that whether the co-perpetrator's statement interlocked with a confession by the defendant was *not* an appropriate factor to be considered in determining the trustworthiness and reliability of the declarant and his statement"; trustworthiness inquiry must be conducted "without reference to any corroboration provided by the interlocking nature of the two statements").

In addition to these six holdings, two federal courts of appeals have ruled, in direct opposition to the Washington Supreme Court's interpretation of *Wright*, that the *Wright* anti-corroboration rule is not limited to physical evidence. *Compare United States v. Gomez-Lemos*, 939 F.2d 326, 332 (6th Cir. 1991) (In *Wright*, "the Supreme Court reversed itself on the question of whether corroboration from other witnesses may

be considered in evaluating whether hearsay testimony meets the reliability requirements of the Confrontation Clause" and barred the consideration of such corroborative evidence) *and Government of the Virgin Islands v. Joseph*, 964 F.2d 1380, 1385, 1387 (3rd Cir. 1992) (*Wright* barred consideration of corroborative elements of other another witness's testimony to establish reliability of out of court statement) *with Rice*, 844 P.2d at 427 n.5 (*Wright* "appears to have only rejected the use of corroborating *physical* evidence to establish reliability").

Given all of these courts' diametrically opposed views of the Confrontation Clause and of this Court's precedent, this Court should grant certiorari to resolve this conflict. This Court has stated that an accomplice's confession that incriminates a criminal defendant is "devastating" and "enormously damaging" evidence against a criminal defendant. *Cruz*, 481 U.S. at 192. The admissibility of such evidence should not depend on which state the defendant lives in.

### B. The Washington Supreme Court's Holding Contravenes This Court's Precedent.

A careful review of this Court's decisions reveals that, contrary to the Washington Supreme Court in this case, those courts that reject the use of "interlocking" evidence, have the better view of the Confrontation Clause as construed in *Roberts* and its progeny. *Roberts* explicitly links the Confrontation Clause with traditional hearsay law. 448 U.S. at 65. And as this Court explained in *Wright*, traditional hearsay law forbids courts from looking to *any* corroborative evidence in assessing the reliability of hearsay evidence. 497 U.S. at 19-20. There is no hearsay exception for interlocking statements. Nor has any court ever stated that an interlocking confession is more trustworthy corroborating evidence than other types of corroborating evidence.

Further, this Court in *Wright* strongly suggested, if not explicitly ruled, that *Cruz* should be read as permitting consideration of the interlocking nature of confessions. The *Wright* opinion notes that "[t]he Court [in *Cruz*] said nothing about whether the



codefendant's confession would be admissible against the defendant simply because it may have 'interlocked' with the defendant's confession." *Wright*, 497 U.S. at 823 n.*. Indeed, given the holding in *Cruz* – that a codefendant's interlocking confession is not admissible against a defendant in a joint trial in which the codefendant does not testify – it is difficult to imagine why such a confession would be admissible in a separate trial involving only the defendant.

The *Wright* opinion also explains that "although we considered in *Lee v. Illinois* the 'interlocking' nature of a codefendant's and a defendant's confessions to determine whether the codefendant's confession was sufficiently trustworthy for confrontation purposes, we declined to rely on corroborative physical evidence and indeed *rejected the 'interlock' theory in that case*." *Wright*, 497 U.S. at 824 (emphasis added). If this Court believed *Lee* only to have held that the confessions in that case were not truly interlocking, it would have said in *Wright* that it rejected the state's argument that the confessions were actually interlocking, not that it rejected "*the 'interlock' theory*" there. *Id.* (emphasis added). Rejecting a factual argument is different than rejecting a legal theory.

Finally, the plurality opinion in *Lilly v. Virginia* demonstrates that *Wright* prohibits all use of interlocking evidence. In *Lilly*, the Virginia Supreme Court held that a nontestifying accomplice's confession was reliable in part because of "the correspondence between [the accomplice's] account and the accounts of other persons acquired by law enforcement authorities" and because it was corroborated by another accomplice's trial testimony. *Lilly v. Commonwealth*, 499 S.E.2d 522, 534 (Va. 1998). A four-justice plurality of this Court, applying *Wright*, squarely rejected this basis of establishing reliability, holding that the fact "[t]hat other evidence at trial corroborated portions of [the accomplice's] statements is irrelevant." *Lilly v. Virginia*, 527 U.S. at 137 (plurality opinion). The plurality categorically explained that "'[t]o be admissible under the Confrontation Clause, . . . hearsay evidence used to convict a defendant must possess

indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial.'" *Id.* at 138 (quoting *Wright*, 497 U.S. at 822). (None of the five concurring Justices addressed this particular issue.)

**C. This Case is an Excellent Vehicle for Considering This Issue.**

For three reasons, this case provides an excellent vehicle for considering this issue involving interlocking confessions.

First, *the sole reason* that Washington Supreme Court found the potential accomplice's custodial statement reliable here, and thus admissible under the *Roberts* guarantees-of-trustworthiness inquiry, was because parts of it interlocked with Petitioner's custodial statement. In fact, in the opinion the Washington Supreme Court was reviewing, the Washington Court of Appeals held that there were numerous reasons surrounding the accomplice's statement to doubt its veracity (such as the accomplice's motive to lie; her history of lying to police; her potential lack of knowledge; the custodial setting; and the fact that it described past events), App. 13a, and the Washington Supreme Court left those conclusions undisturbed. Consequently, the correctness of the Washington Supreme Court's decision, and admissibility of the accomplice's statement, stands or falls according to whether evidence of "interlock" permits a court to find that an accomplice's out of court confession is sufficiently trustworthy for admission against a criminal defendant.

Second, it is clear from the opinions below that if the accomplice's statement was erroneously admitted at Petitioner's trial, the error was not harmless. Not only does the interlocking nature of the accomplice's confession provide the sole basis for the Washington Supreme Court's decision, which would allow this Court to reverse without reaching any other issues, but the Washington Court of Appeals – the only court to conduct a harmless error inquiry in this case – expressly held that "[t]here is reasonable doubt that the jury would have reached the same verdict in the absence of Sylvia's statements." App. 15a. This is because Petitioner maintained at trial that he acted in self-



defense, and Sylvia's statement "refutes [that] claim." *Id.* Indeed, this case presents the paradigmatic situation in which the admission of a nontestifying accomplice's interlocking confession prejudices the defense – *i.e.*, when the defendant disputes the prosecution's interpretation of his confession and the accomplice's statement suggests that the defendant is not being fully truthful about a critical aspect of his defense. *See Cruz*, 481 U.S. at 192 (admitting interlocking confession is "enormously damaging" when defendant seeks at trial to dispute the accuracy of his confession); *see also Wilson v. State*, 639 A.2d 125, 137 (Md. 1994) (erroneous admission of interlocking confession that "strongly buttressed" defendant's confession and prosecution's theory was not harmless); *Watkins*, 475 N.W.2d at 747 (same).[1]

Third, this case comes to this Court on direct review (so no collateral relief complications are present), and there is no doubt that Petitioner's confrontation argument was properly presented to the state courts. Both the Washington Court of Appeals and the Washington Supreme Court reached Petitioner's confrontation argument without noting any preservation issues, and the Washington Supreme Court expressly held as a matter of state law that Petitioner had not waived this argument by also relying upon Washington's marital privilege statute.

[1] This is another point on which Washington Supreme Court precedent conflicts with this Court's. Although the Washington Supreme Court held in *Rice* that an interlocking confession that was "virtually identical to that of a defendant" may be deemed harmless, 844 P.2d at 426-27, this Court made it clear in *Cruz* that "'interlocking' bears a positively inverse relationship" to prejudice to the defendant's case. 481 U.S. at 192. "A codefendant's confession will be relatively harmless if the incriminating story it tells is different from that which the defendant himself is alleged to have told, but enormously damaging if it confirms, in all essential respects, the defendant's alleged confession." *Id.* The Washington Supreme Court's "virtually identical" standard has it exactly backwards.

## II. THIS COURT SHOULD GRANT CERTIORARI TO REEXMINE THE CONFRONTATION CLAUSE FRAMEWORK ESTABLISHED IN *OHIO V. ROBERTS* AND TO HOLD THAT OUT-OF-COURT "TESTIMONIAL" STATEMENTS OFFERED AGAINST A DEFENDANT ARE PER SE INADMISSIBLE.

The split of authority concerning interlocking confessions is endemic of the need to reexamine the Confrontation Clause in a more fundamental manner. This Court should take this opportunity to do so and adopt a new framework that decouples the Confrontation Clause from ordinary hearsay law. This modification would not require this Court to overrule any of its prior decisions, but it would greatly simplify applications of the Confrontation Clause, deconstitutionalize hearsay law, and bring the Confrontation Clause back in line with its textual and historical underpinnings.

### A. Justices of This Court, Leading Scholars, and the United States Solicitor General All Recently Have Urged This Court to Reexamine the *Ohio v. Roberts* Framework.

In *White v. Illinois*, 502 U.S. 346 (1992), Justices Thomas and Scalia noted that "this Court's cases unnecessarily have complicated and confused the relationship between the constitutional right to confrontation and the hearsay rules of evidence." *White*, 502 U.S. at 365 (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment). Consequently, they urged this Court to abandon the hearsay-based confrontation framework that this Court established in *Ohio v. Roberts*, 448 U.S. 56, 65 (1980), in favor of one, advocated by the Solicitor General of the United States, that focuses on the face-to-face confrontation of "witnesses" whose "testimony" is offered against criminal defendants. Under this "testimonial" approach, the Confrontation Clause bars the introduction of extrajudicial statements "only insofar as they are contained in formalized testimonial material, such as affidavits, depositions, prior testimony, or confessions." *White*, 502 U.S. at 365 (Thomas, J., concurring in part and concurring in judgment). But when the testimonial approach bars the admission of such a statement, it bars it absolutely; whether such a statement bears particularized guarantees of trustworthiness is irrelevant. On the other hand, under this approach, if the



out-of-court statement at issue is not "testimonial," only hearsay law governs its admissibility. The Confrontation Clause is not implicated, regardless of how unreliable the statement might appear to be. *Id.* at 366.

During the last several years, several leading scholars have endorsed this general testimonial approach as consonant with the history and purpose of the Confrontation Clause. *See, e.g.*, Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 Geo. L. Rev. 1011 (1998); Akil Reed Amar, The Constitution and Criminal Procedure 129-31 & n.194 (1997); Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 Minn. L. Rev. 559, 561 (1992). The right to confrontation long predates modern hearsay law and was adopted as a means of prohibiting the old English practice of allowing witnesses to testify against defendant via affidavits, ex parte depositions, and written confessions. *See, e.g.*, *White*, 502 U.S. at 359-64 (Thomas, J., concurring in part and concurring in judgment); Friedman, 86 Geo. L. Rev. at 1022-26. The "testimonial" approach also honors the text of the Confrontation Clause by actually giving meaning to the word "witnesses" in the Clause, for only witnesses offer testimony. *See id.* And, as opinions and briefs to this Court have noted, this approach also conforms to this Court's consistent instincts concerning the reach of the Confrontation Clause. All of this Court's decisions would have come out the same way under the testimonial approach. *See White*, 502 U.S. at 365 & n.2 (Thomas, J., concurring in part and concurring in judgment); Brief *Amicus Curiae* for ACLU in *Lilly v. Virginia*, 527 U.S. 116 (1999), at 25-29.

The problem with the current *Roberts* framework, as recently summarized by Professor Friedman, is that it:

> gives the [confrontation] right too broad a scope and then denigrates it by dilution. Under this conception, the confrontation right is treated as a generalized protection against unreliable evidence – a role for which it is not intended, and which . . . it does not perform well. As the same time, this conception fails to recognize the confrontation right as an expression of one of the basic

> procedures of our criminal justice system. Thus, . . . this conception makes easy cases hard; instead of treating the Confrontation Clause as a ringing endorsement of a principle that commands widespread respect, the courts treat is as a complex, amorphous, and technical expression of principles that are baffling even to lawyers.

Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. Pa. L. Rev. 1171, 1228 (2002). Instead of protecting criminal defendants' procedural right to a particular type of adversarial adjudicative process, in short, the *Roberts* framework conceptualizes the confrontation right as a nebulous backup to ordinary rules of evidence.

*Lilly v. Virginia*, 527 U.S. 116 (1999), this Court's most recent Confrontation Clause case, exemplifies the unnecessary confusion that this Court's current doctrine generates. Although the admittance of the extrajudicial statement at issue there, an accomplice's custodial confession, constituted a "paradigmatic" Confrontation Clause violation under the testimonial approach, *id.* at 143 (Scalia, J., concurring in part and concurring in judgment), the other seven Justices spent numerous pages parsing out the complexities of the *Roberts* test and were still unable to agree on how exactly it applied there.

Nevertheless, because *Lilly*'s four-justice plurality agreed with Justices Scalia and Thomas that both the *Roberts* framework and the testimonial approach mandated exclusion of the accomplice's confession, this Court declined to undertake a thorough reexamination of the *Roberts* framework. *See Lilly*, 527 U.S. at 124-25 (plurality opinion). Justice Breyer, however, suggested that he was inclined to adopt the testimonial approach and wrote separately expressly to say that "the fact that we do not reevaluate [the *Roberts* framework] in this case does not end the matter. It may leave the question open for another day." *Id.* at 142-43 (Breyer, J., concurring). Petitioner respectfully suggests that that day has come.



### B. The Need for a Reexamination of the *Roberts* Framework Is Pressing Because It Regularly Allows the Admission of Extrajudicial Statements That Implicate the Core Concerns of the Confrontation Clause.

Although this Court in *Lilly* deemed it unnecessary to reevaluate the *Roberts* framework, the plurality seemingly attempted to bring the *Roberts* "particularized guarantees" inquiry closer to the per se testimonial approach. The plurality stated: "It is *highly unlikely* that the presumptive unreliability that attaches to accomplices' confessions that shift or spread blame can be effectively rebutted when the statements are given under conditions that implicate the core concerns of the old ex parte affidavit practice – that is, when the government is involved in the statements' production, and when the statements describe past events and have not been subjected to adversarial testing." 527 U.S. at 137 (emphasis added). A review of case law in the three and one-half years since that decision, however, reveals that far from being "highly unlikely" that such extrajudicial statements will be admitted against criminal defendants, the practice is still quite common throughout the country. Accordingly, there can no longer be any doubt that the *Roberts* framework regularly allows courts to admit evidence at the heart of the "evil to which the [Confrontation Clause] is directed," *White*, 502 U.S. at 365 (Thomas, J., concurring), and that would be per se inadmissible under a testimonial application of the Clause. This Court should not allow this subversion of a critical constitutional guarantee to continue.

In addition to the Washington Supreme Court in this case, several other courts since the *Lilly* decision have upheld the admission of accomplices' custodial confessions that implicate defendants. *See United States v. Photogrammetric Data Servs., Inc.*, 259 F.3d 229, 245 (4th Cir. 2001) (accomplice's custodial statement that implicated defendant), *cert. denied*, 535 U.S. 926 (2002); *People v. Farrell*, 34 P.3d 401, 406-08 (Colo. 2001) (accomplice's custodial confession that spread blame to defendant); *Stevens v. People*, 29 P.3d 305, 314-18 (Colo. 2001) (accomplice's statement confession that incriminated defendant and minimized accomplice's girlfriend's involvement in crime);

*Taylor v. Commonwealth*, 63 S.W.3d 151, 166-67 (Ky. 2001) (custodial confession of accomplice that implicated defendant); *State v. Sonthinkoummane*, 769 A.2d 330 (N.H. 2000) (custodial confession by codefendant that implicated defendant); *State v. Hawkins*, ___ N.E.2d ___, 2002 Ohio App. LEXIS 7208 (Ohio App. Dec. 31, 2002) (tape recorded statement of accomplice to police that implicated defendant); *State v. Bintz*, 650 N.W.2d 913, 915-18 (Wis. App.) (accomplice's – defendant's brother's – custodial statement implicating defendant), *review denied*, 653 N.W.2d 891 (Wis. 2002); *People v. Lawrence*, 55 P.3d 155 (Colo. App. 2001) (codefendant's statements to police that implicated defendant); *State v. Jones*, 15 P.3d 616, 623-25 (Or. App. 2000) (accomplice custodial confession that implicated defendant); *State v. Marshall*, 737 N.E.2d 1005, 1008-09 (Ohio App. 2000) (videotaped confession by accomplice that implicated defendant); *People v. Schutte*, 613 N.W.2d 370, 376-77 (Mich. App. 2000) (accomplice's statement to police "that inculpated defendant"); *People v. Thomas*, 730 N.E. 618 (Ill. App. 2000) (potential accomplice's statement to police that incriminated defendant); *People v. Campbell*, 721 N.E.2d 1225, 1230 (Ill. App. 1999) (written statement to police by accomplice that implicated defendant). The Seventh Circuit – in a statement that sums up the current state of the law and shows how far from the Confrontation Clause's roots it has strayed – has held that the fact that an accomplice confessed to law enforcement officers during a custodial interrogation is "*but one factor* implicating the reliability," and hence the admissibility, of his statements. *United States v. Castelan*, 219 F.3d 690, 695 (7th Cir. 2000) (emphasis added).

Several other courts have held that the admission of similarly unquestionably "testimonial" statements satisfies the *Roberts* framework. One federal court of appeals "regularly" allows the admission of accomplices' plea allocutions that implicate the defendant, and two other circuits expressly have adopted this rule. *United States v. Dolah*, 245 F.3d 98, 105 (2d Cir. 2001); *accord United States v. Aguilar*, 295 F.3d 1018 (9th Cir. 2002); *United States v. Centracchio*, 257 F.3d 518, 528 (7th Cir. 2001); *United States v. Petrillo*, 237 F.3d 119, 122 (2d Cir. 2000); *United States v. Moskowitz*, 215 F.3d 265, 268-69 (2d Cir. 2000); *United States v. Gallego*, 191 F.3d 156, 168 (2d Cir. 1999).



Two other federal court of appeals, applying *Roberts* and *Lilly*, have held that a witness's prior grand jury testimony that inculpates a defendant is admissible against him whenever it satisfies "the equivalent circumstantial guarantees of trustworthiness" test under Federal Rule of Evidence 807. *United States v. Papajohn*, 212 F.3d 1112, 1116-20 (8th Cir. 2000); *accord United States v. Thomas*, 2002 WL 429383 (4th Cir. 2002). The Eighth Circuit, in fact, in reaching this conclusion, stated that "since only four Justices concurred in the part of the [*Lilly*] opinion" stating it is highly unlikely that prior testimony given under circumstances similar to the old ex parte affidavit practice will be admissible, "it does not bind us." *Id.* at 1119. Regardless of whether this is an accurate application of the "narrowest grounds" rule of *Marks v. United States*, 430 U.S. 188, 193 (1977), it is highly disquieting for a federal court of appeals to reach a decision with which it realizes six sitting Supreme Court Justices (the *Lilly* plurality plus Justices Scalia and Thomas) disagree.[2]

Other courts have allowed the admission of prior testimony from a preliminary hearing of another trial, *Bintz*, 650 N.W.2d at 918-20, and from another trial, *State v.*

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[2] Because the testimonial approach is both "narrow[er]" and "broad[er]" than the *Roberts* framework, *Lilly*, 527 U.S. at 141 (Breyer, J., concurring), courts have had particular difficulty in determining whether the plurality opinion in *Lilly* is binding law. In addition to the Eighth Circuit's *Papajohn* opinion, compare *People v. Beasley*, 609 N.W.2d 581, 587 (Mich. App. 2000) (*Lilly* plurality opinion "is not binding precedent"); *Rankins v. Commonwealth*, 523 S.E.2d 524, 531 & n.7 (*Lilly* plurality not binding because Justice Scalia's approach to dealing with accomplice's custodial confessions is narrower) and *State v. Jones*, 15 P.3d 616, 624 (Or. App. 2000) (same) with *United States v. Gomez*, 191 F.3d 1214, 1221 (10th Cir. 1999) (*Lilly* plurality controls because Justice Scalia "took the most resolute stance against the use of [accomplice confessions]"); *Stribling v. Smith*, 2000 WL 796181, at *7 & n.6 (E.D. Mich. 2000) (same because Justice Scalia applied "categorical[]" rule) and *Stevens v. People*, 29 P.3d 305, 324 (Colo. 2001) (Bender, J., dissenting) (*Lilly* plurality is binding because Justices Scalia and Thomas believe that "all custodial statements made to law enforcement by an accomplice . . . by their very nature" are inadmissible under the Confrontation Clause). Laying down a clear framework in this case would alleviate this confusion.

*McNeill*, 537 S.E.2d 518, 524 (N.C. App. 2000), despite the fact that the testimony incriminated the current defendant and he never had a chance to cross-examine the witnesses. In these cases, the courts – like the courts in the plea allocution line of cases, *see, e.g., Aguilar*, 295 F.3d at 1021-23 – found that the prior testimony exhibited "particularized guarantees of trustworthiness" under *Roberts* in part because it was given under oath. Whatever merit this analysis may have under the *Roberts* approach, it flies in the face of the purpose of the Confrontation Clause, which was to ban the admission of ex parte affidavits and the like, which were given under oath, but which the Framers nevertheless believed deprived defendants of their right to the adversary process.

The "particularized guarantees" test also persists in the wake of the *Lilly* decision to lead inconsistent and improbable results. For example, while the Seventh Circuit recently held that a DEA agent's statement to an accomplice that "he could help himself by cooperating with the agents" detracted from the trustworthiness of a confession, *Castelan*, 219 F.3d at 695, a state court of appeals held the same year that an accomplice confession was sufficiently reliable for admission even though the police told him that they "may be able to cut him some slack if he confessed." *Marshall*, 737 N.E.2d at 1009. While this Court's plurality opinion in *Lilly* stated that "a suspect's consciousness of his *Miranda* rights has little, if any, bearing on the likelihood of truthfulness of his statements," 527 U.S. at 138, a state court of appeals held last year that accomplice's statement was reliable in part because "she was fully advised of her [*Miranda*] rights." *Hawkins*, 2002 Ohio App. LEXIS at **18. And while the very purpose of the *Roberts* test is to screen out untrustworthy evidence, Washington Supreme Court recently went so far to hold that an extrajudicial statement by an alleged child victim to a police officer had particularized guarantees sufficient to permit its admission at trial even though the child was incompetent to testify because he was "unable to characterize the difference between truthful and false statements." *State v. C.J.*, ___ P.3d ___, 2003 WL 252147 (Wash. Feb. 6, 2003). Unless this Court is prepared to undertake a case-by-case



examination of such factbound applications of the "particularized guarantees" test, courts will continue to use their enormous discretion to allow out-of-court statements like these to be admitted against criminal defendants, even though it is quite difficult to say that "adversarial testing would little to [their] reliability." *Wright*, 497 U.S. at 821.

Accordingly, this Court should not wait any longer to reexamine the *Roberts* framework. That framework's totality-of-the-circumstances, reliability-based standard unalterably permits the admission of extrajudicial testimony that flouts the history, text, and purpose of the Confrontation Clause. Adopting the testimonial approach would terminate this constitutional anomaly and return the Confrontation Clause to its proper place in the realm of criminal procedure, and at the same time would deconstitutionalize ordinary hearsay law. This case, which presents a "paradigmatic" violation of the Confrontation Clause under the testimonial approach, *Lilly*, 527 U.S. at 143 (Scalia, J., concurring in part and concurring in judgment), presents the perfect vehicle to do so.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court of Washington,
En Banc.

STATE of Washington, Petitioner,
v.
Michael D. **CRAWFORD**, Respondent.

No. 71683-8.

Argued March 5, 2002.
Decided Sept. 26, 2002.

Defendant was convicted, after a jury trial in the Superior Court, Thurston County, Richard A. Strophy, J., of first-degree assault while armed with deadly weapon. Defendant appealed. The Court of Appeals reversed. Review was granted. The Supreme Court, Bridge, J., held that: (1) defendant's assertion of marital privilege did not waive his confrontation rights as to his wife's hearsay statements, and (2) the wife's hearsay statements were sufficiently reliable to be admitted under the Confrontation Clause.

Court of Appeals reversed; conviction reinstated.

West Headnotes

[1] Criminal Law ⇐662.80
110k662.80

Defendant did not waive his Confrontation Clause rights regarding his wife's tape-recorded hearsay statements to police officers, which were admitted in the prosecution for assault, where defendant exercised his marital privilege to prevent his wife from testifying. U.S.C.A. Const.Amend. 6; West's RCWA 5.60.060(1).

[2] Criminal Law ⇐662.80
110k662.80

Courts are hesitant to accept waiver of a defendant's Sixth Amendment confrontation rights, because of their significance in the trial process. U.S.C.A. Const.Amend. 6.

[3] Criminal Law ⇐662.80
110k662.80

A defendant may waive the right to confront witnesses against him when his own misconduct is responsible for a witness' unavailability at trial. U.S.C.A. Const.Amend. 6.

[4] Criminal Law ⇐662.8
110k662.8

Simply because an extrajudicial statement falls within a hearsay exception does not mean that it will satisfy the Sixth Amendment right to confrontation; therefore, the court will employ specific safeguards to ensure that the proffered evidence offers some reliability in terms of the declarant's perception, memory, and credibility, which is a function traditionally performed by cross-examination. U.S.C.A. Const.Amend. 6.

[5] Criminal Law ⇐662.8
110k662.8

Hearsay statements, to be admissible under the Confrontation Clause, must be admissible under the rules of evidence, and the statements must contain sufficient indicia of reliability and trustworthiness. U.S.C.A. Const.Amend. 6.

[6] Criminal Law ⇐662.8
110k662.8

Admissibility under a firmly-rooted exception to the hearsay rule will satisfy the requirement that extrajudicial statements must contain sufficient indicia of reliability and trustworthiness, as element for admission under Confrontation Clause. U.S.C.A. Const.Amend. 6.

[7] Criminal Law ⇐662.8
110k662.8

If the hearsay exception under which the extrajudicial statements are admissible is not firmly rooted, then the court will consider the following nonexclusive factors to determine the relative reliability of hearsay statements, for purposes of Confrontation Clause analysis: (1) whether declarant, at time of making statement, had apparent motive to lie; (2) whether declarant's general character suggests trustworthiness; (3) whether more than one person heard the statement; (4) spontaneity of the statement; (5) whether trustworthiness is suggested from timing of statement and relationship between declarant and witness; (6) whether statement contains express

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assertions of past fact; (7) whether declarant's lack of knowledge could be established by cross-examination; (8) remoteness of possibility that declarant's recollection is faulty; and (9) whether surrounding circumstances suggest that declarant misrepresented defendant's involvement. U.S.C.A. Const.Amend. 6.

[8] Criminal Law ⇐419(2)
110k419(2)

Statements that defendant's wife made to police were not "hearsay," in prosecution for assault; they were not offered to prove the truth of the matters asserted, and instead were offered to demonstrate that defendant and his wife lied about the circumstances preceding the assault. ER 801(c).

[9] Criminal Law ⇐419(2)
110k419(2)

[9] Criminal Law ⇐662.8
110k662.8

Out-of-court statements raise hearsay and Confrontation Clause objections only when they are offered to prove the truth of the matter asserted. U.S.C.A. Const.Amend. 6; ER 801(c).

[10] Criminal Law ⇐419(1.5)
110k419(1.5)

[10] Criminal Law ⇐419(5)
110k419(5)

The second of two statements that defendant's wife made to police constituted "hearsay," in prosecution for assault; the wife was unavailable as witness because husband invoked the marital privilege, and the statements were offered to prove the truth of the matters asserted. West's RCWA 5.60.060(1); ER 801(c).

[11] Criminal Law ⇐662.8
110k662.8

A statement against penal interest is not considered a firmly-rooted exception to the hearsay rule, for purpose of Confrontation Clause analysis for admission of extrajudicial statements; thus, such a statement, if it inculpates the defendant, is admissible against defendant only when it bears adequate indicia of reliability. U.S.C.A. Const.Amend. 6; ER 804(b)(3).

[12] Criminal Law ⇐417(15)
110k417(15)

If self-exculpatory statements are included within a statement that is generally inculpatory to the declarant, only those portions that are actually self-inculpatory are admissible, under the hearsay exception for statements against penal interest. ER 804(b)(3).

[13] Criminal Law ⇐417(15)
110k417(15)

Hearsay statements of defendant's nontestifying wife to police, that defendant was "infuriated" and "past tipsy" when the assault occurred, that defendant said the victim "deserves a[n] ass whoopin'," and that victim may have reached into his pocket, possibly for a weapon, but was not holding a weapon when defendant stabbed him, were against wife's penal interest, as element for admission under hearsay exception for statements against penal interest, where wife had potential accomplice liability for the assault; wife had shown defendant where victim could be found, wife was present throughout the assault, wife did not turn to police when she had the opportunity, wife's statements did not shift blame to defendant, and wife's accomplice liability would be higher if defendant's criminal liability was higher. West's RCWA 9A.08.020(3)(a); ER 804(b)(3).

[14] Criminal Law ⇐662.10
110k662.10

A co-defendant's confession is presumed unreliable, for purposes of analyzing its admissibility under the Confrontation Clause. U.S.C.A. Const.Amend. 6.

[15] Criminal Law ⇐662.10
110k662.10

When a co-defendant's confession is virtually identical, i.e., interlocks, to the defendant's confession, it may be deemed reliable, for purposes of Confrontation Clause analysis regarding admissibility of the co-defendant's confession. U.S.C.A. Const.Amend. 6.

[16] Criminal Law ⇐662.8
110k662.8

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Statements that defendant and his wife gave to police were virtually identical and interlocking, so that wife's hearsay statements to police, which were otherwise admissible under a hearsay exception as statements against her penal interest, were sufficiently reliable, for purposes of Confrontation Clause analysis in prosecution for assault; defendant and his wife were equally unsure whether victim had been holding a weapon, and neither defendant nor his wife clearly stated that victim had a weapon in hand from which defendant was simply defending himself. U.S.C.A. Const.Amend. 6; ER 804(b)(3)

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**657 *426 Edward Holm, Thurston County Prosecutor, Steven Sherman, Deputy, Olympia, for Petitioner.

Thomas Doyle, Hansville, Patricia Pethick, Tacoma, for Respondent.

**658 BRIDGE, J.

This case presents two issues: (1) whether a defendant waives an objection under the confrontation *427 clause to the admission of his wife's hearsay statements by exercising his marital privilege to prevent his spouse from testifying; and (2) whether the wife's statements are otherwise admissible as an exception to the hearsay rule or as an interlocking confession. We hold that a defendant does not waive his confrontation rights when he invokes the marital privilege. We also conclude that the statements here are admissible because the wife's statements interlock with those of her husband and hence provide adequate indicia of reliability to satisfy confrontation clause concerns.

## FACTS

On August 5, 1999, Michael Crawford stabbed Richard Rubin Kenneth Lee at Lee's apartment. *State v. Crawford*, noted at 107 Wash.App. 1025, 2001 WL 850119, at *1 (2001). Police arrested Crawford that evening and they collected two taped statements from both Crawford and his wife, Sylvia, who had been present at the time of the assault. Id. The first statements contained roughly the same account of the attack: the three had collected at Lee's house; Crawford left to buy alcohol; when he returned, Lee was making sexual advances toward Sylvia; Crawford stabbed Lee twice. Id.

Several hours after police taped the first statements, they again questioned the Crawfords independently regarding the events of August 5. Id. Their stories were again similar to each other, but distinctly different from the earlier version of the encounter. Id. This time the Crawfords each revealed that the alleged sexual assault had actually occurred several weeks earlier. Id. On the night in question, both Crawfords contended, Michael became angry when Lee was mentioned and he and his wife left to find Lee. Id. Sylvia directed her husband to Lee's apartment and after talking with him for a short period, Crawford stabbed Lee twice. Id. Although unclear, the main distinguishing factor in these second statements was that Crawford alluded that Lee *may* have had something in his hand *when* Crawford *428 stabbed Lee, while Sylvia implied that Lee *may* have grabbed for something *after* Crawford stabbed Lee. Id.

Crawford was charged with attempted first degree murder while armed with a deadly weapon and first degree assault while armed with a deadly weapon. Clerk's Papers (CP) at 2. At trial, Crawford claimed that he acted in self- defense and he invoked the marital privilege to prevent his wife from testifying against him. Report of Proceedings (RP) at 7-8. The trial court admitted both of Sylvia's statements on the grounds that the statements would not violate the marital privilege and because the court determined that the statements were sufficiently reliable to alleviate confrontation clause concerns. RP at 45, 53; RP at 219-21, Exs. 37, 38; RP at 231, Exs. 41-42. A jury subsequently convicted Crawford of first degree assault while armed with a deadly weapon. CP at 2. In an unpublished opinion, a divided Court of Appeals concluded that Crawford did not waive his right to confrontation when he invoked the marital privilege. *Crawford*, 2001 WL 850119, at *1. It then held that admitting Sylvia's second statement was reversible error because her statement did not possess adequate indicia of reliability, nor did it interlock with Michael's second statement. Id. at *5-7. Accordingly, the Court of Appeals reversed Crawford's conviction. Id. at *1. We granted review.

## WAIVER OF RIGHT TO CONFRONTATION

[1] Crawford invoked the marital privilege, RCW 5.60.060, to keep his wife from testifying against him at trial. RP at 7. The marital privilege in

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Washington states in relevant part:

> A husband shall not be examined for or against his wife, without the consent of the wife, nor a wife for or against her husband without the consent of the husband; nor can either during marriage or afterward, be without the consent of the other, examined as to any communication made by one to the other during marriage.

*429 RCW 5.60.060(1). Neither Crawford nor the State called Sylvia to testify. *See* RP at **659 7-14. Crawford claims, however, that his confrontation right under the Sixth Amendment, as applied to the states through the due process clause of the Fourteenth Amendment, was violated when Sylvia's hearsay statements to the police were admitted at trial.

The State contends that Crawford waived his right to confrontation when he neglected to call Sylvia at trial, relying on *State v. Salazar*, 59 Wash.App. 202, 796 P.2d 773 (1990) and *In re Personal Restraint of Sauve*, 103 Wash.2d 322, 692 P.2d 818 (1985), to support its position. While instructive, both *Salazar* and *Sauve* contain a key distinction from the case before us, making them distinguishable. In those cases the witness was "available"; Sylvia Crawford was not an available witness.

In *Salazar*, the defense counsel did not call an informant suggesting that defense was unable to locate him. 59 Wash.App. at 216, 796 P.2d 773. Rejecting the assertion that the witness was unavailable, the court stated, "We have held that a defendant who fails to call an available hearsay declarant waives an objection under the confrontation clause to admission of the hearsay." *Salazar*, 59 Wash.App. at 217, 796 P.2d 773 (citing *State v. Borland*, 57 Wash.App. 7, 12, 786 P.2d 810 (1990)). "Similarly, defense counsel's failure to call [the informant], who we assume was available absent persuasive evidence to the contrary, waived any confrontation clause objection." *Id.*

In *Sauve*, the defendant claimed that his confrontation right was violated when the police officer who received an informant's tip, failed to testify at the suppression hearing. 103 Wash.2d at 329, 692 P.2d 818. Although the court did not directly hold that Sauve had waived his confrontation right, it did note that the defendant's failure to exercise his rights at trial did not constitute a denial of such rights by the court. *Sauve*, 103 Wash.2d at 330, 692 P.2d 818 (citing *State v. Murphy*, 35 Wash.App. 658, 669 P.2d 891 (1983); *State v. Whittington*, 27 Wash.App. 422, 618 P.2d 121 (1980)). Accordingly, the court stated,

> There is no evidence that petitioner asked the State for the testimony of the officer who received the tip, nor did petitioner *430 himself attempt to call the officer to the stand. The State was not given a chance at trial to either present the officer's testimony or prove his unavailability. The failure of petitioner to exercise his rights at trial does not constitute a denial of such rights.
> *Id.*

In both *Salazar* and *Sauve* the witnesses were available, but the defense failed to call them at trial. In the case presented, in contrast, the witness, Sylvia Crawford, was unavailable to testify because Michael Crawford had invoked his marital privilege. The marital privilege explicitly states that "[a] husband shall not be examined for or against his wife, without the consent of the wife, nor a wife for or against her husband without the consent of the husband." RCW 5.60.060(1). This language specifically denies Sylvia the ability to testify either for or against her husband, rendering her unavailable as a witness. Although Michael, not Sylvia, invoked the privilege, the result is the same--Sylvia was unavailable to testify, unlike the witnesses in *Salazar* and *Sauve*. Therefore, the situation before us is distinct from *Salazar* and *Sauve* and it does not logically follow that Crawford waived his confrontation rights by not calling his wife to testify.

The conclusion that Crawford did not waive his confrontation rights is supported by a decision from this court that directly addressed the issue of marital privilege and extrajudicial statements by a third party. *See State v. Burden*, 120 Wash.2d 371, 374, 841 P.2d 758 (1992). In *Burden*, this court stated, "Here, the defendant asserts admission of Mary Burden's extrajudicial statements by third persons would indirectly violate the testimonial privilege and place [the defendant] in the position of having to waive the privilege to refute the testimony or allow the testimony without cross examination. We have previously rejected this argument." *Id.* (citing *State v. Kosanke*, 23 Wash.2d 211, 160 P.2d 541 (1945)). By recognizing the rejection of this argument, this court implied that the testimonial privilege is not violated by admissible hearsay

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statements*431 and, furthermore, that the defendant does not have **660 to waive the marital privilege to refute the testimony. Therefore, the defendant cannot be said to have waived his right to cross examination. [FN1]

FN1. Citing *Kosanke*, the *Burden* court further supported its position that the admission of the testimony neither indirectly violated the marital privilege nor forced the defendant to waive the privilege to refute the testimony.
"[T]he court [has not gone] so far as to hold that relevant and material evidence could not be adduced merely because, in order to refute the same, the wife of a defendant might have to be called as a witness. In this case the wife of appellant was not called as a witness by respondent, nor was the attention of the jury called to her in such a way as to require objection on the part of appellant in order to preserve his rights under the statute.... [T]he fact that refutation of competent evidence would require the wife being a witness does not make it erroneous to adduce the testimony. *The statute [testimonial privilege] was not violated either directly or indirectly.*"
*Burden*, 120 Wash.2d at 374, 841 P.2d 758 (quoting *Kosanke*, 23 Wash.2d at 217-18, 160 P.2d 541). According to this passage it is clear that the marital privilege still stands, as well as the right to confront the witness; neither has been waived.

[2][3] Further, courts are hesitant to accept waiver of a defendant's Sixth Amendment rights because of their significance in the trial process. *See generally* John R. Kroger, *The Confrontation Waiver Rule*, 76 B.U. L.REV. 835 (1996). " 'There are few subjects, perhaps, upon which [the Supreme Court] and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.' " *Id.* at 840 (quoting *Pointer v. Texas*, 380 U.S. 400, 405, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965)). Where a waiver has been recognized, the waiver usually occurs when the defendant has inappropriately caused the witness's unavailability. *Id.* at 844. Thus, " 'a defendant may waive the right to confront witnesses against him when his own misconduct is responsible for a witness's unavailability at trial.' " *Id.* at 842 (quoting *United States v. Potamitis*, 739 F.2d 784, 788 (2d Cir.1984)). Misconduct is not apparent when a defendant invokes a statutory privilege, however. *See United States v. Barlow*, 693 F.2d 954, 962 (6th Cir.1982) (suggesting that only sham marriage would result in waiver, but admitting legitimate spouse's grand jury testimony when it met *432 adequate guarantees of trustworthiness). In the case before us Crawford invoked a recognized statutory privilege. [FN2]

FN2. Although no formula has emerged for application of the confrontation waiver rule, case law suggests six major legal issues that courts will resolve before applying the doctrine: "(1) witness unavailability, (2) cause of unavailability, (3) intent, (4) standard of proof, (5) statement reliability, and (6) waiver hearing procedure." Kroger, *supra*, at 846. The key element for this case is the cause of the unavailability. "Two paradigmatic ways in which a defendant satisfies the causation requirement have evolved: murder and threats." *Id.* at 849. From this statement it is apparent that the evolution of the waiver doctrine has not been directed at the legitimate invocation of statutory privileges, absent threat or other indication of malfeasance.

As the Court of Appeals acknowledged here, forcing the defendant to choose between the marital privilege and confronting his spouse presents an untenable Hobson's choice. *Crawford*, 2001 WL 850119, at *1. The Court of Appeals aptly noted that this court traditionally has "not required a defendant to waive one right to preserve another." *Id.* (citing *State v. Michielli*, 132 Wash.2d 229, 246, 937 P.2d 587 (1997) (upholding dismissal of case where defendant was forced to choose between waiving right to speedy trial or right to effective assistance of counsel); *State v. Price*, 94 Wash.2d 810, 814, 620 P.2d 994 (1980) (stating that forcing defendant to choose between effective assistance of counsel and speedy trial impermissibly prejudices defendant)). Both *Michielli* and *Price* present situations where a defendant was forced to balance his trial rights and ultimately select one right to the exclusion of the other. To force a defendant to choose the more difficult position of confronting his spouse on the stand, or to assume that he has waived his confrontation right by electing not to call his wife, presents a similarly untenable choice and undermines the marital privilege itself. Therefore, we hold that Crawford did not waive his right to confrontation when he invoked the marital privilege.

**661 ADMISSIBILITY OF HEARSAY

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If Crawford did not waive his right to confrontation, the State contends in the alternative that Sylvia's out-of-court *433 statements to the police were admissible hearsay that did not violate the Sixth Amendment.

This court has noted a distinction between in-court testimony and extrajudicial statements by a spouse. In drawing a distinction between the two, we have concluded that hearsay statements may be admissible under certain circumstances. *Burden*, 120 Wash.2d at 377, 841 P.2d 758. Forcing a spouse to testify, however, challenges the policy purposes behind the privilege. In *Burden*, this court determined that the policy purposes--fostering domestic harmony and preventing discord, reflecting the natural repugnance of having one spouse testify against the other, and preventing the testifying spouse from having to choose between perjury, contempt of court, or jeopardizing the marriage--supported this distinction. *Id.* at 375, 841 P.2d 758 (citing *State v. Thorne*, 43 Wash.2d 47, 55, 260 P.2d 331 (1953); *State v. Wood*, 52 Wash.App. 159, 163, 758 P.2d 530 (1988); Teresa Virginia Bigelow, Comment, *The Marital Privileges in Washington Law: Spouse Testimony and Marital Communications*, 54 WASH. L.REV. 65, 70 (1978-79)). We concluded that the latter two purposes would not be affected by allowing third person testimony, because the spouse would not be testifying in court, and questioned the applicability of the first purpose. *Burden*, 120 Wash.2d at 375-76, 841 P.2d 758. Thus, as we have acknowledged, confronting a spouse on the stand is quite distinct from admitting an extrajudicial statement.

[4] To assess whether an extrajudicial hearsay statement is admissible we apply a multilayered analysis, in consideration of the valuable constitutional protections afforded by the Sixth Amendment. Simply because a statement falls within a hearsay exception does not mean that it will satisfy the Sixth Amendment. *State v. Rice*, 120 Wash.2d 549, 565, 844 P.2d 416 (1993). Therefore, the court will employ specific safeguards " 'to ensure that the proffered evidence offers some reliability in terms of the declarant's perception, memory and credibility--a function traditionally performed by cross examination.' " *Id.* at 566, 844 P.2d 416 (quoting *State v. Anderson*, 107 Wash.2d 745, 750-51, 733 P.2d 517 (1987)).

[5][6][7] *434 First, the statements must be admissible under the rules of evidence. *Rice*, 120 Wash.2d at 564, 844 P.2d 416. Second, the statements must contain a sufficient indicia of reliability and trustworthiness to satisfy the requirements of the confrontation clause. *Id.* A firmly rooted exception to the hearsay rule will satisfy this requirement. *State v. Davis*, 141 Wash.2d 798, 845, 10 P.3d 977 (2000). If the exception is not firmly rooted, then the court will consider nine nonexclusive factors to determine the relative reliability of the hearsay statements. [FN3] *Rice*, 120 Wash.2d at 565-66, 844 P.2d 416; *State v. Whelchel*, 115 Wash.2d 708, 722-25, 801 P.2d 948 (1990). Alternatively, the indicia of reliability test can be met if the statements "interlock" in accordance with our decision in *Rice*. 120 Wash.2d at 569-70, 844 P.2d 416.

FN3. The nine factors include: (1) whether the declarant, at the time of making the statement, had an apparent motive to lie; (2) whether the declarant's general character suggests trustworthiness; (3) whether more than one person heard the statement; (4) the spontaneity of the statement; (5) whether trustworthiness is suggested from the timing of the statement and the relationship between the declarant and the witness; (6) whether the statement contains express assertions of past fact; (7) whether the declarant's lack of knowledge could be established by cross-examination; (8) the remoteness of the possibility that the declarant's recollection is faulty; and (9) whether the surrounding circumstances suggest that the declarant misrepresented the defendant's involvement.

[8][9] Sylvia's first statement to the police is not hearsay because it was not offered to prove the truth of the matter asserted. [FN4] ER 801(c). Instead, as the Court of Appeals noted, it was offered to demonstrate that the Crawfords lied about the circumstances preceding the assault. *Crawford*, 2001 WL **662 850119, at *5. Considering that out-of-court statements raise hearsay and confrontation clause objections only when they are offered to prove the truth of the matter asserted, Sylvia's first statement is not inherently objectionable. *State v. Parris*, 98 Wash.2d 140, 145, 654 P.2d 77 (1982). It will be admissible, however, only if it is relevant under ER 401, and it is relevant only if her second statement is admitted.

FN4. The defense counsel did not object to the admission of the statements as hearsay when they

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were presented at trial. *See* RP at 219- 32. Defense argument appears to hinge on the previous invocation of the marital privilege and right to confrontation. *See* RP at 7-21, 37.

[10][11] ***435** Sylvia's second statement is hearsay: The declarant is unavailable at trial--because Crawford invoked the marital privilege--and the statement is being offered to prove the truth of the matter asserted. ER 801(c). The State contends that Sylvia's second statement is admissible under ER 804(b)(3), the hearsay exception for a declarant's statement against penal interest. A statement against penal interest is not considered a firmly rooted exception to the hearsay rule, however. *Whelchel,* 115 Wash.2d at 715, 801 P.2d 948. Therefore, "out-of-court statements from a nontestifying codefendant made against penal interests and which inculpate the defendant are admissible against the defendant only when they bear adequate indicia of reliability." *State v. St. Pierre,* 111 Wash.2d 105, 113, 759 P.2d 383 (1988) (citing *Anderson,* 107 Wash.2d at 750, 733 P.2d 517; *State v. Dictado,* 102 Wash.2d 277, 287-88, 687 P.2d 172 (1984)). Thus, we must determine whether the statement contains a sufficient indicia of reliability to satisfy the confrontation clause. *See Ohio v. Roberts,* 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980).

[12] Before we determine whether the statement is sufficiently reliable to satisfy confrontation clause concerns, we must assess which portions of the statement were actually against Sylvia's penal interest. Only the portions of Sylvia's statement that are self-inculpatory will be admitted under the statement against interest exception to the hearsay rule. *See State v. Roberts,* 142 Wash.2d 471, 491-97, 14 P.3d 713 (2000); ER 804(b)(3). In *Roberts* this court adopted the Supreme Court's rejection of a "whole statement" approach to defendant declarations. 142 Wash.2d at 494, 14 P.3d 713 (adopting *Williamson v. United States,* 512 U.S. 594, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994)). Therefore, even though self-exculpatory statements may be included within a statement that is generally inculpatory, only those portions that are actually self-inculpatory are admissible. *Id.* at 492-94, 14 P.3d 713.

A statement against interest, or self-inculpatory statement, is defined as:

***436** A statement which was *at the time of its making* so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true.
ER 804(b)(3) (emphasis added).

[13] Crawford objected to the admission of Sylvia's statements that he was " 'infuriated,' " " 'past tipsy,' " and that he said Lee " 'deserves a ass whoopin.' " *Crawford,* 2001 WL 850119, at *7 n. 3 (Armstrong, C.J., dissenting). He also objected to the admission of Sylvia's statement regarding whether Lee reached for or possessed a weapon when Michael assaulted him because it allegedly rebutted his own testimony and damaged his self-defense claim.

While potentially damaging to Michael, these statements are all inculpatory of Sylvia as well. It was Sylvia who showed Michael where to find Lee and she was present through the duration of the violent encounter. She walked away from the stabbing with Michael and did not turn to the police when she had the opportunity. As a potential accomplice, [FN5] therefore, Sylvia would benefit from limiting Michael's involvement; the lesser his charge, the lesser her accomplice liability. Sylvia's statements that Michael was "infuriated," "past tipsy," and that he ****663** said Lee "deserves a ass whoopin" would not shift blame from her to Michael, but rather it could increase Michael's culpability, and potentially hers as well. Furthermore, if Sylvia knew that Michael wanted to give Lee an "ass whoopin" and took Michael to find Lee, this fact could support a charge against Sylvia for accomplice liability because she could be viewed as encouraging or aiding the facilitation of a crime. *See* RCW 9A.08.020(3)(a). Likewise, Sylvia's assertion that Lee ***437** may have reached into his pocket, possibly for a weapon, but had empty hands when Michael stabbed him, would be against her interest. Rather, she would benefit her own case if she had said that Lee wielded a weapon throughout the confrontation and that Michael was merely protecting himself. Therefore, we conclude that these statements were self-inculpatory and admissible hearsay, provided they meet a sufficient indicia of reliability.

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FN5. An accomplice is someone who with knowledge that it will promote or facilitate the commission of a crime either (1) solicits, commands, encourages, or requests such other person to commit the crime or (2) aids or agrees to aid the other person in planning or committing the crime. RCW 9A.08.020(3)(a).

[14][15] Because a codefendant's confession is presumed unreliable, [FN6] the statement must either meet a firmly rooted exception to the hearsay rule [FN7] or provide some indicia of reliability, such as interlocking with the defendant's own confession. *St. Pierre,* 111 Wash.2d at 112-13, 759 P.2d 383. The State asserts that Sylvia's second statement is admissible as an interlocking confession with Michael's second statement. *See generally Rice,* 120 Wash.2d 549, 844 P.2d 416 (adopting *Lee v. Illinois,* 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986)). As this court recognized in *Rice,* "[w]hen a codefendant's confession is virtually identical [i.e., interlocks] to that of a defendant, it may be deemed reliable." *Id.* at 570, 844 P.2d 416 (citing *Lee,* 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514). Hence an interlocking confession will serve the same purpose as the nine-factor test in assessing reliability. *Id.*

FN6. Although Sylvia is not a codefendant, as she has not been formally charged with a crime, her role is similar to that of a codefendant. She was present during the assault, was arrested and gave a statement to the police concerning the events, and had an arguable motive to shift the blame away from herself. Her role in this case thus suggests applying the *Rice* interlocking confession analysis by analogy.

FN7. As previously noted, a statement against penal interest is not a firmly rooted hearsay exception for purposes of the confrontation clause.

[16] The Court of Appeals here held that, although the Crawfords' statements were "very similar," they differed regarding whether Lee was armed when Michael stabbed him. *Crawford,* 2001 WL 850119, at *6. Following are the two statements for comparison.

Sylvia's statement:
Q: did Kenny do anything to fight back from this assault
***438** A: (pausing) I know he reached into his pocket ... or somethin' ... I don't know what
Q: after he was stabbed
A: he saw Michael coming up. He lifted his hand ... his chest open, he might of went to go strike his hand out or something and then (inaudible)
Q: okay, you, you gotta speak up
A: okay, he lifted his hand over his head maybe to strike Michael's hand down or something and then he put his hands in his ... put his right hand in his right pocket ... took a step back ... Michael proceeded to stab him ... then his hands were like ... how do you explain this ... open arms ... with his hands open and he fell down ... and we ran (describing subject holding hands open, palms toward assailant)
Q: okay, when he's standing there with his open hands you're talking about Kenny, correct
A: yeah, after, after the fact, yes
Q: did you see anything in his hands at that point
A: (pausing) um um (no)
Ex. 42, at 6-7.

Michael's statement:
Q: okay. Did you ever see anything in [Lee's] hands
A: I think so, but I'm not positive
Q: okay, when you think so, what do you mean by that
A: I coulda swore I seen him goin' for somethin' before, right before everything ****664** happened. He was like reachin', fiddlin' around down here and stuff ... and I just ... I don't know, I think, this is just a possibility, but I think, I think that he pulled somethin' out and I grabbed for it and that's how I got cut ... but I'm not positive. I, I my mind goes blank when things like this happen. I mean, I just, I remember things wrong, I remember things that just doesn't, don't make sense to me later.
Ex. 44, at 7.

Although the Court of Appeals concluded that the statements were contradictory, upon closer inspection they appear ***439** to overlap. The Court of Appeals stated that Sylvia's version of the story had Lee grabbing for something only after he had been stabbed, while Michael stated that Lee may have had something in his hand before the attack. *Crawford,* 2001 WL 850119, at *6. However, when asked whether Lee fought back from the assault, Sylvia states that Lee "lifted his hand over his head maybe to strike Michael's hand down or something and then he put his hands in his ... put his right

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hand in his right pocket ... took a step back ... Michael proceeded to stab him...." Ex. 42, at 7. She also previously stated that she was unsure how Michael received the cut on his hand. *Id.* at 6. Thus, it is unclear from Sylvia's statement when, if ever, Lee possessed a weapon.

Michael's statement is equally ambiguous. He states, "I coulda swore I seen him goin' for somethin' before, right before everything happened. He was like reachin', fiddlin' around down here and stuff ... and I just ... I don't know, I think, this is just a possibility, but I think, I think that he pulled somethin' out and I grabbed for it and that's how I got cut ... but I'm not positive." Ex. 44, at 7. Thus, both of the Crawfords' statements indicate that Lee was possibly grabbing for a weapon, but they are equally unsure when this event may have taken place. They are also equally unsure how Michael received the cut on his hand, leading the court to question when, if ever, Lee possessed a weapon. In this respect they overlap.

Self-defense is at issue in this case, so admittedly the timing of Lee's possession of a weapon is significant. However, both of the Crawfords' statements are ambiguous as to whether Lee ever actually possessed a weapon. The interlocking confession rule is designed to admit "virtually identical" statements. *Rice,* 120 Wash.2d at 570, 844 P.2d 416. As the dissent from the Court of Appeals noted, and we agree, "neither Michael nor Sylvia clearly stated that Lee had a weapon in hand from which Michael was simply defending himself. And it is this omission by both that interlocks the statements and makes Sylvia's statement reliable." *Crawford,* *440 *2001 WL 850119, at * 7 (Armstrong, C.J., dissenting). Because Sylvia's and Michael's statements are virtually identical, admission of Sylvia's statement satisfies the requirement of reliability under the confrontation clause.*

CONCLUSION

We hold that a defendant does not waive his Sixth Amendment right to confront an adverse witness when he invokes the marital privilege to keep his wife from testifying at trial. Thus, Michael Crawford did not waive his confrontation clause rights when he invoked RCW 5.60.060 and refused to call his wife, Sylvia, to testify at his trial. Sylvia's pretrial statements to the police, at issue in this case, were admissible, however, because they were self- inculpatory and they interlocked with Michaels' own admissible statements.

We reverse the Court of Appeals and reinstate the conviction.

ALEXANDER, C.J., SMITH, JOHNSON, MADSEN, SANDERS, IRELAND, CHAMBERS and OWENS, JJ., concur.

54 P.3d 656, 147 Wash.2d 424

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NOTE: UNPUBLISHED OPINION, SEE RCWA 2.06.040

Court of Appeals of Washington, Division 2.

STATE of Washington, Respondent,
v.
Michael CRAWFORD, Appellant.

No. 25307-1-II.

July 30, 2001.

Appeal from Superior Court of Thurston County, Docket No. 99-1-01205-8, judgment or order under review, date filed 11/19/1999; Richard A. Strophy, Judge.

Thomas E. Doyle, Attorney At Law, Hansville, WA, for appellant(s).

Steven C. Sherman, Thurston Co Pros Office, Olympia, WA, for respondent(s).

UNPUBLISHED OPINION

BRIDGEWATER.

BRIDGEWATER.

*1 Michael Crawford appeals his conviction of first degree assault while armed with a deadly weapon. We reverse.

FACTS

On August 5, 1999, defendant Michael D. Crawford stabbed Rubin Richard Kenneth Lee at Lee's home. Police apprehended Michael that evening and he gave two taped statements. His wife, Sylvia Crawford, was with him during the stabbing; she also gave police two taped statements.

The Crawfords' first taped statements contained roughly similar stories. The Crawfords stated that they knew Lee and that they went to visit him at his apartment the day of the stabbing. Michael left briefly to go to a nearby store. Lee then made sexual advances toward Sylvia, which she fought off. Michael returned and heard his wife yelling. Michael and Lee started to fight and Lee was stabbed. The Crawfords quickly left.

The police separately questioned the Crawfords a second time several hours later. Again their statements were roughly similar, but the stories changed from the first version. They each stated that the alleged sexual assault by Lee against Sylvia had actually occurred several weeks earlier.

On the day of the stabbing, the Crawfords were visiting with friends when someone mentioned Lee. Michael became angry and he and Sylvia went to find Lee. They went to several bars looking for Lee before going to his apartment. They knocked at the wrong apartment, but Lee opened his door. The three talked for a short time and then Michael stabbed Lee. The difference in the second statements is that in Michael's second statement he says that Lee may have had something in his hand when he stabbed Lee, but in Sylvia's second statement, she says that Lee may have grabbed for something later, after Michael stabbed him.

The trial judge admitted both of Sylvia's statements after Michael invoked the marital privilege to prevent her from testifying.

The jury convicted Michael of first degree assault while armed with a deadly weapon.

ANALYSIS

I. Waiver of the Confrontation Right

The State, citing *State v. Salazar,* 59 Wn.App. 202, 217, 796 P.2d 773 (1990), argues that Michael waived his right to confrontation by not allowing Sylvia to testify. The marital privilege statute, RCW 5.60.060(1), states that a wife shall not be examined for or against her husband without her husband's consent. The State argues that Michael could have allowed Sylvia to testify, and by not doing so, he waived his right to confrontation. We disagree.

The Salazar Court held that a defendant who fails to call an available hearsay declarant waives a confrontation clause objection to the hearsay statement. We question this result. But even if we accept Salazar's reasoning, the issue here is different. In Salazar, the defendant had no right to prevent the witness from testifying. Here, Michael had a statutory right to keep his wife from testifying

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against him. And the State cites no authority to support the notion that a defendant waives his or her constitutional right to confront an adverse witness by invoking another right to keep the witness from testifying. Moreover, the argument runs counter to the rationale of *State v. Burden*, 120 Wn.2d 371, 378, 841 P.2d 758 (1992), where the court held that marital privilege does not bar third-person testimony of the defendant's wife's hearsay statements, but the statements 'must still meet other requirements for admissibility.' If a defendant waives a confrontation clause challenge by invoking the marital privilege, there would be no other requirements to meet. Furthermore, in other settings, we have not required a defendant to waive one right to preserve another. See *State v. Michielli*, 132 Wn.2d 229, 246, 937 P.2d 587 (1997) (upholding dismissal of a case where defendant was forced to choose between waiving the right to a speedy trial or the right to effective assistance of counsel); *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980) (stating that forcing defendant to choose between effective assistance of counsel and speedy trial impermissibly prejudices defendant). Forcing Michael to relinquish the marital privilege to preserve his right to confrontation would render the marital privilege meaningless. We decline to do so.

II. Admissibility of Sylvia's Out-of-Court Statements

A. Standard of Review

*2 We use a three-step analysis to review the trial court's decision to admit Sylvia's statements. 'First, we must determine whether the statements are admissible under our Rules of Evidence. Second, we consider whether additional indicia of reliability satisfy the requirements of the confrontation clause. Finally, even if a statement fails to meet these requirements, we consider whether or not the error was harmless.' *State v. Rice*, 120 Wn.2d 549, 564, 844 P.2d 416 (1993).

B. Admissibility of Sylvia's Statements

Michael argues that Sylvia's out-of-court statements to the police were inadmissible under the confrontation clause of the Sixth Amendment and ER 804(b)(3). The confrontation clause gives a defendant the right to 'be confronted with the witnesses against him .' U.S. Const. amend. 6. Hearsay evidence does not offend the confrontation clause if the hearsay statement bears 'adequate indicia of reliability.' *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). A statement bears adequate indicia of reliability if it (1) falls within a firmly rooted hearsay exception or (2) contains 'particularized guarantees of trustworthiness.' Roberts, 448 U.S. at 66. ER 804(b)(3)--the hearsay exception for statements against the declarant's penal interest--is not considered a firmly rooted hearsay exception. *State v. Whelchel*, 115 Wn.2d 708, 715, 801 P.2d 948 (1990).

But evidence that satisfies the third prong of ER 804(b)(3) also satisfies the confrontation clause requirement of 'indicia of reliability.' ER 804(b)(3) allows the court to admit a hearsay statement against penal interest if (1) the declarant is unavailable at trial; (2) the statement tends to subject the declarant to criminal liability such that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true; and (3) corroborating circumstances clearly indicate the trustworthiness of the statement. ER 804(b)(3). The corroboration requirement under ER 804(b)(3) 'arguably mirrors' the trustworthiness requirement under the confrontation clause. *Whelchel*, 115 Wn.2d at 716. Thus, a corroborated inculpatory statement that is admissible under ER 804(b)(3) satisfies the confrontation clause as well. *Whelchel*, 115 Wn.2d at 716-17.

1. The First Statement

Sylvia made two statements to the police. The State correctly points out that Sylvia's first statement is not hearsay because it was not used to prove the truth of the matter asserted. Rather, it was used to show that the Crawfords initially lied about the circumstances that led up to the stabbing. Confrontation and hearsay problems arise only when the out-of-court statement is offered to prove the truth of the matter asserted. *State v. Parris*, 98 Wn.2d 140, 145, 654 P.2d 77 (1982). Thus, Sylvia's first statement is not objectionable under the confrontation clause or ER 804(b)(3). However, it is admissible only if it is relevant under ER 401, and it is relevant only if the second statement is admitted, because the second statement impeaches the first by its supposed truthfulness. Thus, if the second statement is not admitted, then the first statement is not relevant and not admissible.

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2. The Second Statement

*3 Because Sylvia's second statement is hearsay, the ER 804(b)(3) analysis is necessary. The rule's first requirement--that the declarant be unavailable--is met. ER 804(a) defines 'unavailability' to include a witness who is exempt from testifying because of privilege. Here, the parties agreed that Sylvia was unavailable to testify pursuant to the marital privilege statute, RCW 5.60.010(a).

The second requirement of ER 804(b)(3) is that the declarant's statement be against his or her penal interest. Washington courts have analyzed this requirement in the context of accomplices' or co-defendants' hearsay statements. See, e.g., *Whelchel*, 115 Wn.2d 708; *State v. St. Pierre*, 111 Wn.2d 105, 117-18, 759 P.2d 383 (1988). The question is whether the overall circumstances surrounding the statement tend to make it self-serving or disserving. *Whelchel*, 115 Wn.2d at 721. Relevant factors may include a declarant's motive to curry favor with the authorities; whether the declarant gave the statement spontaneously and freely or under potentially coercive conditions; whether the declarant sought to avoid culpability, sought revenge against the defendant, or was afraid of the defendant; and whether the declarant sought a plea bargain. *Whelchel*, 115 Wn.2d at 717-22.

The trial court concluded that Sylvia's second statement, as a whole, was against her penal interest. Although it was Michael's idea to go find Lee, Sylvia admitted that she agreed to accompany him. She admitted that she showed Michael where Lee lived so that Michael could confront him. She also admitted that she thought the stabbing was 'justified' and did not call the police afterward. These admissions could give rise to accomplice liability for Sylvia. There is no indication that Sylvia was coerced--the detective read Sylvia her Miranda [FN1] rights, and she waived them. There is also no suggestion of plea-bargaining. Instead of trying to foist blame onto Michael, Sylvia hedged about how Lee was stabbed and whose knife was used to stab him. She also backtracked about how angry Michael was when he found out about Lee's sexual advances. Finally, she defended Michael to the police, saying, '{H}e's one of the most fair people you'll ever meet' and that he was her 'best friend.' Ex. 42 at 8. Considering this evidence, the trial court concluded that Sylvia's apparent motive in talking to the police was to help Michael.

FN1. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

We hold that the trial court was correct that parts of Sylvia's statement were against her penal interest. But parts of her statement were not against her penal interest. Sylvia described Michael as 'infuriated,' 'enraged,' and 'past tipsy,' and she stated that Michael said Lee 'deserves a ass whoopin'.' Ex. 42 at 4. These statements, argues Michael, tend to exculpate Sylvia while incriminating him. We agree.

The U.S. Supreme Court considered the same argument in *Williamson v. U.S.*, 512 U.S. 594, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994). The District Court had ruled below that an accomplice's confession was admissible against the defendant under Fed.R.Evid. 804(b)(3). *Williamson*, 512 U.S. at 597. Parts of the confession were self-inculpatory, but other parts were not. *Williamson*, 512 U.S. at 604. After analyzing the text and the principle behind Rule 804(b)(3), the Supreme Court held that it was improper to admit the entire confession. *Williamson*, 512 U.S. at 604. The Court remanded the case for a determination of which parts of the confession were truly self- inculpatory. *Williamson*, 512 U.S. at 604. Our Supreme Court followed *Williamson* in *State v. Roberts*, 142 Wn.2d 471, 499, 14 P.3d 713 (2000), where it held that parts of the non-testifying co-defendant's confession were both against his interest and reliable. Thus, the Roberts court sent the case back to redact the non-testifying co-defendant's statement to allow in evidence only those portions that were against his interest and reliable.

*4 Similarly, parts of Sylvia's statement were not against her penal interest. Thus, the statement-against-penal-interest exception does not apply to these parts, and they are inadmissible unless some other hearsay exception applies. The State argues that these self-exculpatory parts are admissible under ER 803(a)(3), the state-of-mind exception. This exception allows into evidence hearsay statements of 'the declarant's then existing state of mind, emotion, sensation or physical condition.' But this exception is not applicable here. The declarant is Sylvia; when she said that Michael was 'infuriated,' 'enraged,' and 'past tipsy,' she was describing Michael's state of mind, not her own. Even if the exception applied to Michael's

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declaration that Lee 'deserves a ass whoopin',' there remains an additional level of hearsay (Sylvia's repeating that statement) that would exclude it. Hearsay within hearsay is inadmissible unless a hearsay exception applies to each statement. ER 805. Thus, because no hearsay exception applies to the self-exculpatory parts of Sylvia's statement, it was error to admit them.

Now we turn to whether Sylvia's redacted statements, i.e., those that were against her penal interest, were reliable. Washington courts use a nine-part test to determine whether an out-of-court statement satisfies the reliability prong of ER 804(b)(3) and the confrontation clause. This nine-part test examines factors that show particularized guaranties of the statement's trustworthiness. *Whelchel,* 115 Wn.2d at 722-25. Not all of the factors need to be present for the statement to be admissible. *State v. Anderson,* 107 Wn.2d 745, 753, 733 P.2d 517 (1987).

The first guideline is whether the declarant had an apparent motive to lie. As noted above, Sylvia's apparent motive was to help Michael. In fact, she admitted that her first statement was in part a lie. And although her statement did not resemble the unequivocal blame-shifting apparent in many accomplice confessions, it also does not show a motive to be truthful.

The second guideline is whether the declarant's general character suggests trustworthiness. Sylvia gave the police two versions of her statement within four hours of each other. This does not suggest trustworthiness.

As in *Whelchel,* the third guideline--whether more than one person heard the statement--is irrelevant here since the police taped Sylvia's statement. See *Whelchel,* 115 Wn.2d at 722.

The fourth guideline is whether the declarant made the statement spontaneously. The *Whelchel* court found that a voluntary and spontaneous statement suggested more trustworthiness than specific answers to specific questions. *Whelchel,* 115 Wn.2d at 723. Here Sylvia made her statement during police questioning, so the format necessarily consisted of answers to specific questions. Parts of her statement consisted of narrative, but they were not 'spontaneous' or 'voluntary' in the sense that she offered unsolicited information to the police. She was responding to questions such as '{W}hat happened between you and Kenny the first time{?}' Ex. 42 at 3, or 'How did you end up back over there today?' Ex. 42 at 4. But when answering questions that would incriminate Michael, Sylvia was evasive, hedging, or hesitant to respond. Overall, Sylvia's statements do not show the spontaneity that suggests reliability.

***5** The fifth guideline is whether the timing of the statements and the relationship between the declarant and the witness suggests trustworthiness. Statements to friends may be more trustworthy than statements to police. *Whelchel,* 115 Wn.2d at 723. Although one court found reliable a statement made to police immediately after the event in question, the court also noted that the declarant made the statement 'without any attempt to fabricate a response.' *State v. Rivas,* 49 Wn.App. 677, 688, 746 P.2d 312 (1987). Since Sylvia had already fabricated one response to police and was evasive in parts of her statement, this factor also suggests untrustworthiness.

Guideline six is whether Sylvia's statement contained express assertions of past fact. Her statement is mostly express assertions of past fact. Thus, it did not carry on its face a warning against giving it undue weight. *Whelchel,* 115 Wn.2d at 724. This weighs against admitting the statement.

The seventh guideline is whether cross-examination could help to show the declarant's lack of knowledge. This factor tends to support a finding of trustworthiness. There is no dispute that Sylvia was present before, during, and after the stabbing. But Sylvia stated that she shut her eyes during the stabbing. Cross-examination could show that she did not see Lee attack Michael because of this. We conclude that cross-examination could reveal that she lacked knowledge of what happened.

Guideline eight is the possibility that Sylvia's recollection was faulty because the event was remote. This factor suggests trustworthiness. Sylvia gave her statement the same day of the stabbing, so there is little chance that the events faded in her memory. And although she admits that she had been drinking that day, a breathalyzer test administered by the police indicated a blood alcohol content of .000. Thus, it is unlikely that Sylvia's recollection was faulty.

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The final guideline is whether the circumstances surrounding the statement suggest that the declarant misrepresented the defendant's involvement. Sylvia arguably may have tried to misrepresent Michael's involvement in the stabbing, but as we have discussed, she apparently was trying to help him, not implicate him. The fact that Sylvia initially lied to police does suggest untrustworthiness under this guideline (as well as guideline two). And to the extent that Michael's two inconsistent statements to the police constitute 'circumstances surrounding' Sylvia's statement, they also indicate untrustworthiness.

Overall, the nine-factor test fails to demonstrate that Sylvia's statement to the police was sufficiently reliable to satisfy the third prong of ER 804(b)(3) and the confrontation clause. But the State contends that Michael's confession shows the reliability of Sylvia's statement. Ordinarily, it is inappropriate to look at other evidence to establish a hearsay statement's reliability. *Whelchel,* 115 Wn.2d at 725. But in *State v. Rice,* 120 Wn.2d at 570, our Supreme Court found an accomplice's confession reliable after comparing it to another confession. The Court held that the accomplice's confession in a letter to his girlfriend was reliable and therefore properly admitted against the defendant. But the Court found the same accomplice's confession to police unreliable based on the nine-factor test. Nonetheless, the Court held that the similarity between the two confessions made the police confession reliable and rendered any error in admitting the police confession harmless. In holding that the similarity made reliable an otherwise unreliable confession, the Court relied on *Lee v. Illinois,* 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986), for the rule that '{w}hen a codefendant's confession is virtually identical to that of a defendant, it may be deemed reliable as an 'interlocking' confession.' *Rice,* 120 Wn.2d at 570.

***6** But that reasoning does not apply in this case. Although the Crawfords' second statements to the police were very similar--on the day of the stabbing, they were hanging out drinking; someone mentioned Lee; Michael got angry; he and Sylvia set out looking for Lee; they went to several bars and finally Lee's apartment; they initially knocked on the wrong door; Lee came out; the three of them chatted for a few minutes; Michael stabbed Lee; and the Crawfords ran away--the stories differ regarding whether Lee was armed when Michael stabbed him. Michael's second version asserts that Lee may have had something in his hand when he stabbed him; but Sylvia's version has Lee grabbing for something only after he has been stabbed. [FN2] The dissimilarity of these statements does not satisfy the reliability requirement of the confrontation clause and ER 804(b)(3).

FN2. Sylvia's statement:
Q: Did Kenny do anything to fight back from this assault?
A: (pausing) I know he reached into his pocket ... or somethin' ... I don't know what.
Q: After he was stabbed.
A: He saw Michael coming up. He lifted his hand ... his chest open, he might of {sic} went to go strike his hand out or something and then (inaudible).
Q: Okay, you, you gotta speak up.
A: Okay he lifted his hand over his head maybe to strike Michael's hand down or something and then he put his hands in his ... put his right hand in his right pocket ... took a step back ... Michael proceeded to stab him ... then his hands were like ... how do you explain this ... open arms ... with his hands open and he fell down ... and we ran (describing subject holding hands open, palms toward assailant).
Q: Okay, when he's standing there with his open hands you're talking about Kenny, correct.
A: Yeah, after, after the fact, yes.
Q: Did you see anything in his hands at that point?
A: (pausing) um um (no).
Ex. 42 at 6-7.
Michael's statement:
Q: Okay. Did you ever see anything in {Lee's} hands?
A: I think so, but I'm not positive.
Q: Okay, when you think so, what do you mean by that?
A: I coulda swore I seen him goin' for somethin' before, right before everything happened. He was like reachin', fiddlin' around down here and stuff ... and I just ... I don't know, I think, this is just a possibility, but I think, I think that he pulled somethin' out and I grabbed for it and that's how I got cut ... but I'm not positive. I, I my mind goes blank when things like this happen. I mean, I just, I remember things wrong, I remember things that just doesn't, don't make sense to me later. Ex. 44 at 7.

The tests in *Whelchel* and *Rice* are designed to admit evidence that is reliable. They are not designed to elicit impeaching evidence, but to get to

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the truth of what occurred. In this case, Michael's and Sylvia's second statements are similar, but Sylvia's statement was plainly untrustworthy under the *Whelchel* and *Rice* tests. Thus, it was error to admit it. And because Sylvia's second statement is inadmissible, her first statement is also inadmissible.

And admitting Sylvia's statements was not harmless. A constitutional error is harmless if the reviewing court is convinced beyond a reasonable doubt that a reasonable jury would reach the same verdict had the error not occurred. *State v. Easter,* 130 Wn .2d 228, 242, 922 P.2d 1285 (1996). Here, Sylvia's second statement refutes Michael's claim of self-defense, because Sylvia said that Lee may have reached in his pocket after Michael stabbed him. And the State wanted to admit the second statement not to show that Sylvia's statements were the 'truth,' but to show that Michael is a person who lies and would get the person closest to him, Sylvia, to lie in the first statement. The overwhelming message is that the jury cannot trust Michael's story. There is a reasonable doubt that the jury would have reached the same verdict in the absence of Sylvia's statements; thus, admitting the statements was reversible error.

3. *Lilly v. Virginia*

Crawford argues that the U.S. Supreme Court's decision in *Lilly v. Virginia,* 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999), requires exclusion of Sylvia's out-of-court statements. In *Lilly,* the Court determined that the admission of a non-testifying accomplice's confession violated the defendant's Sixth Amendment right of confrontation. *Lilly,* 527 U.S. at 139. The Virginia court had admitted the confession on the ground that it satisfied Virginia's statement against penal interest exception to the hearsay rule. *Lilly,* 527 U.S. at 122. A plurality of four justices found that accomplices' confessions are not within a firmly rooted exception to the confrontation clause. *Lilly,* 527 U.S. at 134. Turning then to the 'residual trustworthiness test' of the confrontation clause--whether the statement has 'particularized guarantees of trustworthiness'--the plurality was unconvinced that the accomplice's confession was sufficiently reliable to be admitted without opportunity for cross-examination. *Lilly,* 527 U.S. at 137-38.

*7 *Lilly* is on point in this case. In *Lilly,* the disputed statement did not fall under a firmly rooted hearsay exception, nor did it meet the Sixth Amendment's 'residual trustworthiness test.' Here, neither of Sylvia's statements survives a confrontation clause challenge under the Sixth Amendment's 'residual trustworthiness test' or under a firmly rooted hearsay exception. Thus, *Lilly* requires exclusion of both Sylvia's statements.

Reversed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

HOUGHTON, J., concurs.

ARMSTRONG, C.J. (dissenting).

I agree with the majority that the court erred in admitting those parts of Sylvia's statement that were not inculpatory. [FN3] But I disagree with the majority's conclusion that no part of Sylvia's second statement is admissible. Because Sylvia's second statement is the same as Michael's second statement in all important aspects, I believe the trial court properly admitted her statement as an interlocking confession under *State v. Rice,* 120 Wn.2d 549, 844 P.2d 416 (1993).

FN3. But it was harmless error. Michael objects to Sylvia's statements that he was 'infuriated,' 'enraged,' and 'past tipsy,' and that he said Lee 'deserves a ass whoopin'.' Ex. 42 at 4. The jury heard a tape of Michael's own statements to police in which he said he wanted to 'kick { (Lee's} ass,' and that on the day of the stabbing he was 'mad, mad ... mad enough to go find {Lee}.' Ex. 44 at 3. Thus, the jury would have reached its same verdict even if the trial court had excluded the non-inculpatory parts of Sylvia's statement; admitting them was harmless error.

The majority finds that Sylvia's and Michael's second statements differ in whether the victim, Lee, reached for something before or after Michael stabbed him. I disagree. Both said that Lee may have reached for something before or during the stabbing. Sylvia said Lee put his hand over his head, 'put his hands in his ... put his right hand in his right pocket ... took a step back ... Michael proceeded to stab him....' Ex. 42 at 7. Michael said, 'I could a swore I seen him goin' for

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somethin' before, right before everything happened.' Ex. 44 at 7. Thus, the statements, although vague, are essentially the same on the critical question of whether Michael acted in self-defense. Moreover, neither Michael nor Sylvia mentioned Lee reaching for something until police raised the possibility that Lee was armed. Michael's statement is reliable because he was motivated to put the best light possible on his conduct. And Sylvia's statement is reliable because she too was motivated to put the best light possible on Michael's conduct. Yet neither could offer more than that the victim may have reached for something immediately before the stabbing.

Whether or not Lee was armed is certainly critical to Michael's claim of self- defense. But any dissimilarity in the Crawfords' statements regarding Lee being armed is minor. The majority confuses these two considerations and wrongly concludes that because the statements are slightly dissimilar on a critical issue, there is a critical difference between the statements. I disagree.

Moreover, even if we read Sylvia's statement as reporting that Lee reached for something after the stabbing, the statements are still the same in one essential fact: neither Michael nor Sylvia clearly stated that Lee had a weapon in hand from which Michael was simply defending himself. And it is this omission by both that interlocks the statements and makes Sylvia's statement reliable.

*8 In conclusion, I would hold Sylvia's statement was properly admitted because it interlocks with Michael's statement.

107 Wash.App. 1025, 2001 WL 850119 (Wash.App. Div. 2)

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# THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

MICHAEL D. CRAWFORD,

Respondent.

NO. 71683-8

**ORDER DENYING MOTION FOR RECONSIDERATION**

FILED
SUPREME COURT
STATE OF WASHINGTON
2002 DEC 12 P 2:08
BRUCE MERRITT
CLERK

The Court having considered the Respondent's Motion for Reconsideration

Now, therefore, it is hereby

ORDERED:

That the Respondent's Motion for Reconsideration is denied.

DATED at Olympia, Washington this 12th day of December 2002.

For the Court

CHIEF JUSTICE

*147 Wn.2d 424*

433/197



No. 02-____

**IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA**

MAR 10 2003

MICHAEL D. CRAWFORD,

*Petitioner,*

v.

STATE OF WASHINGTON,

*Respondent.*

On Petition for a Writ of Certiorari
to the Supreme Court of Washington

**CERTIFICATE OF SERVICE**

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ORIGINAL

CERTIFICATE OF SERVICE

---

I hereby certify that on March 6, 2003, I served counsel of record with a true and correct copy of the following documents:

1. Motion to Proceed In Forma Pauperis;
2. Petition for A Writ of Certiorari; and
3. Certificate of Service

by causing the same to be delivered via Federal Express as follows:

Steven C. Sherman
Thurston County Deputy Pros. Atty.
2000 Lakeridge Drive SW
Olympia, WA 98502

I further certify that all parties required to be served have been served.

Bruce E.H. Johnson





02-9410

No. 02-____

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

---

MAR 10 2003

MICHAEL D. CRAWFORD,

*Petitioner,*

v.

STATE OF WASHINGTON,

*Respondent.*

---

On Petition for a Writ of Certiorari
to the Supreme Court of Washington

---

**MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS***

---

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ORIGINAL

## MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Petitioner Michael D. Crawford, through undersigned counsel, asks leave of this Court to file the attached petition for writ of certiorari without prepayment of costs and to proceed *in forma pauperis*. Petitioner is incarcerated. He earns only $55 per month and has no other access to funds. In state courts, Petitioner had a public defender at trial and appointed counsel on appeal, both of which were paid for entirely by the state, pursuant to Article 1 §22 of the Washington State Constitution, Wash. Sup. Ct. Cr. R. 3.1, and Wash. Rev. Code §10.73.150. Petitioner's declaration in support of this motion is attached hereto.

Respectfully submitted,


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02 - 410

## AFFIDAVIT OR DECLARATION IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Michael D. Crawford, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

| Income source | Average monthly amount during the past 12 months | | Amount expected next month | |
|---|---|---|---|---|
| | You | Spouse | You | Spouse |
| Employment | $ 0 | $ N/A | $ 0 | $ N/A |
| Self-employment | $ 0 | $ N/A | $ 0 | $ |
| Income from real property (such as rental income) | $ 0 | $ N/A | $ 0 | $ |
| Interest and dividends | $ 0 | $ | $ 0 | $ |
| Gifts | $ 0 | $ | $ 0 | $ |
| Alimony | $ 0 | $ | $ 0 | $ |
| Child Support | $ 0 | $ | $ 0 | $ |
| Retirement (such as social security, pensions, annuities, insurance) | $ 0 | $ | $ 0 | $ |
| Disability (such as social security, insurance payments) | $ 0 | $ | $ 0 | $ |
| Unemployment payments | $ 0 | $ | $ 0 | $ |
| Public-assistance (such as welfare) | $ 0 | $ | $ 0 | $ |
| Other (specify): Prison Employment | $ 55 | $ | $ 0 | $ |
| **Total monthly income:** | $ 55 | $ | $ 0 | $ |

MAR 10 2003

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

| Employer | Address | Dates of Employment | Gross monthly pay |
|---|---|---|---|
| N/A | | | $ |
| | | | $ |
| | | | $ |

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

| Employer | Address | Dates of Employment | Gross monthly pay |
|---|---|---|---|
| N/A | | | $ |
| | | | $ |
| | | | $ |

4. How much cash do you and your spouse have? $ 0
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

| Financial institution | Type of account | Amount you have | Amount your spouse has |
|---|---|---|---|
| N/A | | $ | $ |
| | | $ | $ |

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value 0

☐ Other real estate
Value 0

☐ Motor Vehicle #1
Year, make & model N/A
Value

☐ Motor Vehicle #2
Year, make & model N/A
Value

☐ Other assets
Description N/A
Value

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

| Person owing you or your spouse money | Amount owed to you | Amount owed to your spouse |
|---|---|---|
| N/A | $ | $ |
| | $ | $ |
| | $ | $ |

7. State the persons who rely on you or your spouse for support.

| Name | Relationship | Age |
|---|---|---|
| N/A | | |
| | | |
| | | |

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

| | You | Your spouse |
|---|---|---|
| Rent or home-mortgage payment (include lot rented for mobile home)<br>Are real estate taxes included? ☐ Yes ☐ No<br>Is property insurance included? ☐ Yes ☐ No | $ N/A | $ |
| Utilities (electricity, heating fuel, water, sewer, and telephone) | $ N/A | $ |
| Home maintenance (repairs and upkeep) | $ N/A | $ |
| Food | $ N/A | $ |
| Clothing | $ N/A | $ |
| Laundry and dry-cleaning | $ N/A | $ |
| Medical and dental expenses | $ N/A | $ |

| | You | Your spouse |
|---|---|---|
| Transportation (not including motor vehicle payments) | $ 0 | $ N/A |
| Recreation, entertainment, newspapers, magazines, etc. | $ | $ |
| Insurance (not deducted from wages or included in mortgage payments) | | |
| Homeowner's or renter's | $ | $ |
| Life | $ | $ |
| Health | $ | $ |
| Motor Vehicle | $ | $ |
| Other: | $ | $ |
| Taxes (not deducted from wages or included in mortgage payments) | | |
| (specify): | $ | $ |
| Installment payments | | |
| Motor Vehicle | $ | $ |
| Credit card(s) | $ | $ |
| Department store(s) | $ | $ |
| Other: | $ | $ |
| Alimony, maintenance, and support paid to others | $ | $ |
| Regular expenses for operation of business, profession, or farm (attach detailed statement) | $ | $ |
| Other (specify): | $ | $ |
| **Total monthly expenses:** | $ | $ |

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☑ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☑ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☑ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I am incarcerated at Stafford Creek Correctional Center, WA. I am not in contact with my wife and I do not know what income (if any) she has.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: February 28, 2003

At: Aberdeen, WA

Marshall Crawford

(Signature)

Supreme Court, U.S.
FILED
MAY 8 2003
CLERK

ORIGINAL

No. 02-9410

IN THE SUPREME COURT OF
THE UNITED STATES OF AMERICA

MICHAEL D. CRAWFORD,
Petitioner

vs.

STATE OF WASHINGTON,
Respondent

On Petition for a Writ of Certiorari to
The Supreme Court of Washington

# RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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## STATEMENT OF THE CASE

Respondent State of Washington, accepts the Statement of the Case set forth in Crawford's Petition as supplemented with the following additional facts and/or corrections of misstatements (numbered in concert with Crawford's Petition):

1. The first statements made by Sylvia and Michael Crawford were similar, but not identical, because they had contrived their statements together before the police caught them. *See*, Appendix A (first statements of Sylvia and Michael Crawford); Appendix B(second statements of Sylvia and Michael Crawford). The discrepancies were significant enough to cause the police to question Sylvia and Michael again, resulting in the second statements of Sylvia and Michael Crawford which were virtually identical in all material respects but one, that being on the question of whether the victim was armed at the time of the assault. On that point, both Sylvia and Michael were equally ambiguous.

Sylvia Crawford was charged by Information on November 24, 1999, with Rendering Criminal Assistance in the First Degree for her part in the assault upon the victim, Mr. Lee. *See*, Appendix C. On December 8, 1999, the Information was amended to include a charge of Assault in the Second Degree, also related to Sylvia's participation in the assault on Mr. Lee. *See*, Appendix D. On January 18, 2000, Sylvia Crawford pleaded guilty to a Second Amended Information charging Assault in the Third Degree and Rendering Criminal Assistance in the First Degree, both related to her role in the August 5, 1999, assault on Mr. Lee. *See*, Appendix E; Appendix F.

3. The Washington Supreme Court did not hold "that Sylvia's second statement was admissible *solely* because it 'appear[ed] to overlap,' or 'interlocked,' with Petitioner's



custodial statement." *See*, Petition at 4 (citing Crawford's Appendix 8A)(emphasis added). The quoted section of the Washington Supreme Court's decision follows that Court's discussion of only those portions of Sylvia and Michael's second statements that concerned the question of whether the victim was armed when Michael stabbed him. *See*, Appendix G at 8. It was *only* those portions of the second statements of Sylvia and Michael Crawford that the Washington Supreme Court said "overlap." *Id.* The actual holding of the Washington Supreme Court was consistent with its own prior case law, including, *State v. Rice*, 120 Wn.2d 549, 844 P.2d 416 (1993), which had adopted this Court's decision in *Lee v. Illinois*, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed. 514 (1986), *i.e.*, that the second statement of Sylvia Crawford was reliable because it was "virtually identical" to the second statement of Michael Crawford. *See*, Appendix G at 8, 9.

## REASONS NOT TO GRANT THE WRIT

1. The issue concerning whether the Confrontation Clause permits admission into evidence of a non-testifying accomplice's custodial statement, on the basis that it is virtually identical to the defendant's confession, is not a critical issue across the Nation and does not require review or re-examination of the Confrontation Clause.

2. The decision of the Washington Supreme Court is not contrary to this Court's precedent.

3. Even if *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990), did overrule that portion of *Lee v. Illinois*, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed. 514 (1986), permitting trial courts to consider the interlocking nature of a co-defendant's statement with a defendant's statement to determine reliability under the Confrontation Clause, any error by the Washington Supreme Court in applying that test for reliability was harmless because the surrounding circumstances of Sylvia Crawford's second statement in this case rendered Sylvia particularly worthy of belief and rendered her second statement reliable for Confrontation Clause purposes.



## ARGUMENT

1. The issue concerning whether the Confrontation Clause permits admission into evidence of a non-testifying accomplice's custodial statement on the basis that it is virtually identical[1] to the defendant's confession is not a critical issue across the Nation. By Petitioner's count, over the past 17 years only eight of the fifty State high courts appear to have addressed the issue of whether the Confrontation Clause permits the admission against a criminal defendant of a custodial statement by an accomplice / co-conspirator on the grounds that the accomplice's statement is "virtually identical" and therefore "interlocks" with the defendant's custodial statement. Those eight appear to be evenly split on the issue. Also by Petitioner's count, only two federal circuits have addressed the issue. This minor split of authority is not the "critical issue in criminal trials across the Nation" that Petitioner proclaims it to be and certainly does not warrant a complete reevaluation of the application of the Confrontation Clause.

2. The decision of the Washington Supreme Court is not contrary to this Court's precedent. The current decision is based upon the Washington Supreme Court' s adoption in *State v. Rice*, 120 Wn.2d 549, 570, 844 P.2d 416, 427 (1993), of this Court's decision in *Lee v. Illinois*, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed. 514 (1986), in which this Court reasoned: "Obviously, when codefendants' confessions are identical in all material respects, the likelihood that they are accurate is significantly increased." *Lee*, 476 U.S. at 545. This Court further explained:

> As we have consistently recognized, a codefendant's confession is presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product

> of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another. If those portions of the codefendant's purportedly "interlocking" statement which bear to any significant degree on the defendant's participation in the crime are not thoroughly substantiated by the defendant's own confession, the admission of the statement poses too serious a threat to the accuracy of the verdict to be countenanced by the Sixth Amendment. In other words, when the discrepancies between the statements are not insignificant, the codefendant's confession may not be admitted.

*Lee*, 476 U.S. at 545. The logical inference of this proposition is that when the discrepancies between the statements *are* insignificant, then the codefendant's statement *may* be admitted.

Petitioner (and those jurisdictions that have held *contra* to the Washington Supreme Court on this issue) has interpreted this Court' s decision in *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990), as overruling that portion of *Lee v. Illinois* suggesting that a codefendant's statement may be admitted when the discrepancies between the statements are insignificant. However, this Court, in *Wright*, merely commented that in *Lee*, it had considered and rejected the interlocking nature of a co-defendant' s and defendant's confessions "in that case." *Lee*, 497 U.S. at 824. *Wright* did not expressly overrule *Lee*.

In addition, in *Wright*, the State was advocating that a non-testifying victim's statement was reliable because it was corroborated by the *physical evidence* obtained during an examination by a physician. *Lee*, 497 U.S. at 809-811, 819. It was in that context that this Court held, as a general proposition: "hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." *Lee*, 497 U.S. at 822. However, the "other evidence" in *Wright*, was not an interlocking confession, the specific evidence sought to be admitted in *Lee*. Therefore,



*Wright* cannot reasonably be interpreted as rejecting consideration of interlocking confessions to determine reliability.

Moreover, common sense demands recognition that a codefendant's statement that, is in all material respects virtually identical to the defendant's statement/confession, is reliable for purposes of satisfying the Confrontation Clause. "[T]he veracity of hearsay statements is sufficiently dependable to allow the untested admission of such statements against an accused when ... it contains 'particularized guarantees of trustworthiness' such that adversarial testing would be expected to add little, if anything, to the statements' reliability." *Lilly v. Virginia*, 527 U.S. 116, 124-125, 119 S.Ct. 1887, 1894, 144 L.Ed.2d 117 (1999)(quoting *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980)). It is difficult to imagine a scenario where adversarial testing would add less to a statement's reliability than when it is virtually identical to the defendant's confession.

3. Even if *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990), did overrule that portion of *Lee v. Illinois*, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed. 514 (1986), permitting trial courts to consider the interlocking nature of a co-defendant's statement with a defendant's statement to determine reliability under the Confrontation Clause, any error by the Washington Supreme Court in applying this test for reliability was harmless because the surrounding circumstances of Sylvia Crawford's second statement in this case rendered Sylvia particularly worthy of belief and rendered her second statement reliable for Confrontation Clause purposes. These "surrounding circumstances" include the fact that Sylvia Crawford was Michael's wife, that Sylvia's second statement was made shortly after Michael's second statement, with no opportunity for the two to discuss the

content of their second statements prior to making them, and that Sylvia's second statement is virtually identical to Michael's.

## CONCLUSION

For the foregoing reasons, the Writ should be denied.

Respectfully Submitted this 8th day of May, 2003.

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## ENDNOTES

1. Petitioner's characterization of this criteria as "parts of it 'interlock'" is inconsistent with applicable case law. *See*, *Lee v. Illinois*, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed. 514 (1986); *State v. Rice*, 120 Wn.2d 549, 844 P.2d 416 (1993).

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# APPENDIX A

The case number is unknown at this point (99-6530). The time is approximately 7:03 p.m. The date is August 5, 1999. I'm Detective Gies of the Olympia Police Department. Also present is Sylvia

q and what's your last name
a Crawford
q Crawford. This statement's being recorded at the Olympia Police Department in a conference room. Sylvia, do you understand this statement is being recorded and is this with your consent
a yes
q ok, please speak up
a yes
q would you give me your full name and spell it please
a Sylvia Margarita Crawford S Y L V I A - M A R G A R I T A - C R A W F O R D
q would you give me your address please
a 8100 Dawn D A W N Hill Drive, Olympia, Washington 98513
q would you give me your home phone number
a 455-8738
q do you have a work phone number
a no
q would you give me your date of birth
a 3/10/78
q Sylvia, this'll be your warning and waiver of constitutional rights. You have the right to remain silent. Anything you say can be used against you in a court of law. You have the right at this time to an attorney of your own choosing and have him or her present before and during questioning and the making of any statements. If you can not afford an attorney, you are entitled to have one appointed for you by the court without cost to you and to have him or her present before and during questioning or the making of any statements. You have the right to exercise any of the above rights at any time before or during any questioning and the making of any statement.
a I have a question
q sure
a since I don't have a lawyer and can't afford one, would we be let go until there was lawyer present or what. How does that work
q well, if you don't, if you can not afford one, one would be appointed to represent you
a yeah but one's not here
q one's not here now. If you want a lawyer here before you say anything, you have the perfect
a will I be detained or will I be let go. (Inaudible) How does that work





q I don't know if you'll be let go or detained more at this point or not. It depends on how the investigation continues. Ok, so I, I can't answer if you'll be detained longer or not, I don't know. At this point this is under investigation and that's, that's where we're at, at this point. Do you understand that
a uh-huh (yes)
q is that yes
a yes
q ok, cause the tape can't see your head
a yeah
q do you want me to read it to you again or do you understand it
a I understand it
q ok, what I'd like you to do is I'd like you to sign here signifying you understand those rights. Ok, and don't hesitate, Sylvia, to ask any questions. (signing) This is the waiver to your rights
a I (inaudible)
q ok, listen carefully. I have read or have had read to me the above explanation of my constitutional rights and I understand them. I have decided not to exercise these rights at this time. Any attached signed statements are made by me freely, voluntarily, and without threats or promises of any kind. Do you understand that
a uh-huh (yes)
q is that yes
a yes
q ok, do you wish to waive your rights at this time. In other words, do you wish to talk to me now
a and get it over with or talk to you later and get it over with, with more advise on what's going on?
q it's your decision. It's totally your decision. You can stop talking at any time. Like if I ask you a question and you don't wish to answer that question, you don't have to
a ok
q do you understand that
a I don't have to answer any questions
q you don't have to at this point if you don't want to
a ok
q or you can just answer a few questions or you can answer them all, it's your decision
a I'll go for that
q ok, does that mean that you'll waive your rights at this time. Ok, that's a yes
a yes
q ok, don't hesitate to ask anything, ok
a ok and earlier while I sitting here, I heard officers talking outside and I heard one of them say they didn't believe me and that (inaudible) charges before here and

yada, yada, yada and whatnot
q ok, I don't know anything about that
a why would, why would they say that
q I don't know why
a (inaudible)
q I can't speak for them. All I can say is maybe they don't believe you. I don't know
a the officer when he came in and he said that it wasn't said but I know that I heard it. I'm know I'm not crazy
q well, I don't know why they said it. I just called in from home, ok, so I don't know why they said it. I'm here, as I've told you earlier, to get to the truth
a yeah
q that's why I'm here, ok. I can't say I don't believe you or believe you because I haven't had a chance
a (inaudible)
q I don't know what's going on, ok, do you understand. Ok, I'd like you to sign here signifying you understand the waiver and you wish to waive your rights, ok
a alright
q ok
a (signing) (speaking under breathe)
q ok, let's back up to this afternoon or maybe early this afternoon and who is Michael Crawford
a my husband
q ok, and you and Michael apparently were at somebody's residence today, is that correct
a yes
q ok, let's start at perhaps noon today. Were you with that individual from noon on today
a nope
q ok, were you with Michael
a yes
q ok, how did you, and the individual that the other individual apparently involved, apparently (inaudible) name, Kenny
a uh-huh (yes)
q (inaudible) say yes or no
a yes
q ok, do you know his last name
a unh-unh (no) I don't
q no, ok, when did you, how long have you known Kenny
a I think it's three or four years now
q has Michael, your husband, known him for three or four years
a he's known him longer
q longer, ok, and have you and Michael been to his residence before





a not together
q ok, be sure you speak up. So you've been there alone with Kenny
a no
q has Michael been there alone with Kenny
a not to my knowledge
q ok, would you say that maybe Michael and Kenny are good friends
a (inaudible) yeah, they respect each other
q ok, maybe drinking buddies, just friends
a (inaudible)I moved away and I just got back into town not too long ago so
q how long
a I've been back into town two months now ok
q why did you move away. Were you separated from Michael for awhile
a um, yeah
q ok, did you and Michael go over to Kenny's residence today
a yep (yes)
q do you know where Kenny lives
a yes
q do you know his address
a no
q do you know the street
a no
q ok, is it an apartment or a regular house
a apartment
q ok, and what time did you and Michael go to Kenny's residence
a I don't know the time. It, it was, af..., it was late afternoon, (inaudible) early evening
q ok, and why did you and Michael go to Kenny's residence
a to go drinking
q ok, with Kenny
a with Kenny
q had he invited you guys over
a yes
q ok, be sure you speak up
a yes
q ok, so you and Michael showed up
a yeah, we were all there
q ok, who else was there
a Kenny
q is that all
a yes
q did you take beer with you or was beer already there
a he had said beer was already there we didn't take any with us

q when did he invite you over
a like I said, early afternoon. We got downtown, walking around, doing our usual thing (inaudible)
q oh, and then he invited over to come on over and go drinking
a yeah, well, (inaudible)
q ok, be sure you speak up. So you guys arrived and started drinking
a no
q what happened
a we arrived, looked for alcohol and there wasn't any so he sent Michael to go get some. (Inaudible) immediately he pinned me down
q ok, we'll get to that, we'll get to that. So he sent Michael to go get beer
a uh-huh (yes)
q did, is that yes
a yes
q did he give Michael money to go get the beer or did Michael take his own money or what
a I don't (inaudible) as far as I knew, Kenny said it was his treat but I'm not positive
q you already drunk
a I (inaudible) been drinking
q during the day
a yes
q and you felt you were pretty intoxicated at the time
a yeah, we were all just having a good time. We were all smiling and laughing and joking around
q downtown
a um, yeah, (inaudible) met up with each other and we walked down to his place
q ok, how long were there before Michael went to go get beer
a (inaudible) minutes (inaudible)
q oh, not long at all
a no
q ok, Michael left
a Michael walked out the door
q and
a Kenny got up to lock it
q Kenny got up to lock the front door. Is that yes
a yes
q ok, did Kenny lock the front door
a I think so
q what happened then. Did you feel anything strange at that point, when he was locking the door
a yeah, I asked him why he did that
q and what did he say





a he said *oh, just because*
q ok, be sure you speak up Sylvia
a he said *Oh, just because*
q ok, what happened then
a what happened then he started asking me if I was drunk
q and what did you say
a I was like, yeah, I'm a wee bit tipsy, you know, and, and, and he took he kind of like touched my leg, a little bit
q your leg
a my leg
q were you standing up
a no, sitting down on the floor
q you were sitting on the floor
a yeah, (inaudible)
q (speaking over) with your knees together like an Indian would sit
a yeah, yes, you know like
q or kind of like a yoga would sit
a (inaudible) in kindergarten, you know, sittin' Indian style (inaudible)
q (inaudible) kind of like an Indian or yoga style
a yes
q so you're sitting like that, did he get down and he got down and touched your leg
a he's sitting down (inaudible) at an angle (inaudible)
q be sure to speak up and talk slowly, walk me through
a ok, and so then he touches my leg at first and I was like (inaudible)
q right below the knee, you show me
a ok, yeah
q ok
a below the knee and I asked him *what are you doing* and he was like *well, why did you come up here* and I was like *what'd you mean, to have a drink* and he was like *I know you came up here for one* and then the bed is right there, it's a studio apartment, and he pinned me on his bed
q how did he pin you on the bed, did he lift you up
a (inaudible) no, he got up and he went over me and pinned me on the bed and I told him, (inaudible) I said *Kenny get off, Kenny get off* and he wasn't listening and he didn't get off and I just started screaming louder and I don't think Michael headed to the store, I think he heard me screaming cause there was he didn't come back with beer and then Mike was pounding on the door and it was like *let me in* and I was like *Kenny get off* and Kenny got up. (Inaudible) and he started kicking the door, I think, it was loud, (inaudible) and I don't know what happened after that (inaudible) and then we ran
q well, let's walk. How did you end up on the bed, is the bed on the ground, is the mattress

a yes, it's on the ground, it's not up or anything
q it's a mattress basically
a yeah
q ok, did he attempt to take off any of your clothes
a he was going like this and pulling (inaudible)
q ok, so you got on grey
a sweat pants
q kind of warm up pants, basketball style warm up pants, is that correct
a I guess
q ok, and your waist is a stretch band around the waist
a (inaudible) stretch (inaudible)
q ok, and what did he try to do with your pants, did he try to pull them out and then downward, or pull them down or what
a no, he had me and he was, I don't know, (inaudible) he did it his hands (inaudible)
q waistband
a and he was pulling down, (inaudible) with my foot
q ok, so he tried to pull your pants down and you were able to fight him off
a ok, I'm getting uncomfortable
q is that correct
a yeah, it wasn't, yeah, I guess
q ok, but he was not successful because you were able to fight him off
a no he wasn't successful, it wasn't really a fight. It was like a push more, it was
q you were resisting
a yes
q ok, and then you started screaming and then you hear
a I started screaming once he pinned me down, I said *get the fuck off me*
q ok, and then a short time there after within maybe a few seconds, you heard Michael
a it was a couple minutes, he had to walk down the stairs and stuff. I don't know (inaudible) happened
q ok, but within a couple of minutes, Michael was back banging on the door
a yes
q ok, and Kenny got up and opened the door
a yeah
q did you see what happened when Kenny opened the door
a I didn't, (inaudible) there's a wall there, I got up but I didn't, there's a wall there and then when I came around the corner, I realized that Kenny was bleeding and got blood on my pants and we ran. I was like Mike, (inaudible) *let's get outta here* and he was *well*, like you know, we were discussing what we should do... I don't know
q was Kenny down on the ground at this point





a Kenny, (inaudible) when I came around the corner
q right
a no, he was still (inaudible) just falling
q just falling
a I think that's how some blood got on me
q did you see
a I don't know
q did you see if he had anything in his hand
a unh-unh (no)
q did you see if Michael had a knife
a unh-unh (no) I was flipped out man, I just wanted to leave
q ok, did Michael say anything about what had happened, think back
a he asked me if I was ok, he asked me if Kenny had hurt me, he asked me if, I was, yeah, he just asked me *are you okay, are you okay*, and I'm like, *yeah, are you okay*, you know, I said *what happened to your hand* he was like *I don't know* (inaudible)
q ok, so he didn't tell you if he'd stabbed or if he had to self-defense or anything like that with Kenny
a unh-unh (no)
q is that no
a no
q ok, did Kenny say anything that you know of, is that no, like a uaaaaa (pain sound)
a grunted
q that was it okay so you guys quickly left the scene
a yes, right away
q did you ever see Michael carrying a knife or anything
a no, I asked him for a cigarette and he gave me one so his hands were free
q did you see blood on his hands
a yeah, I asked him what happened to his hand
q and what did he say
a he said *I don't know* (inaudible)
q his hand was cut
a his hand was cut, pretty, he didn't let me see, it even (inaudible) cause I saw blood dripping from my sweater cause he had it covered up
q ok, do you remember anything else Sylvia
a yeah, Mike gave me the cigarettes
q ok, do you feel
a (inaudible) lighter
q do you feel that when Kenny pushed you down and attempted to take off your pants do you feel like he was trying to sexually assault you
a yes



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q ok, did you at all, do you feel you, at all, that you gave him any indication that you would like to have any sexual activity with him
a no
q ok, did he, while you had contact with him during the day from downtown to the apartment, did he at all advise you, before hand that he would like to have any sexual activity with you
a no, Mikey was right there, he would never say anything like that in from of Mikey
q ok
a he was looped
q he was looped
a (inaudible)
q do you feel he was highly intoxicated at the time
a that I couldn't tell I (inaudible) intoxicated I couldn't
q you weren't but you don't know if he was
a unh-unh (no) I was out having a good time, smiling, laughing and joking around, I and I wasn't, you know, (inaudible) you want anything, and (inaudible)
q ok
a it's none of my business
q ok, how come you didn't call police when you saw Kenny was hurt
a are you kiddin', to be honest I
q I want you to be honest
a I'm not really too upset about the fact that Kenny got hurt
q because of what he was doing to you
a yes, because of what he was doing to me
q ok
a the fact that he didn't respect me, the fact that he wouldn't get off, yeah
q ok
a what was I suppose to do, call the cops and say he was the one who tried to rape me
q do you have anything else you can remember Sylvia, anything else at this point, ok, be turning off the tape at this time.

Transcribed:
REG:tc





The case number is unknown at this point. The time is approximately 8:00 p.m. The date is August the 5th, 1999. I am Detective Gies of the Olympia Police Department. Also present is Detective Sergeant Jim Costa of the Olympia Police Department, and Mr. Michael Crawford. This statement is being recorded at the Olympia Police Department in a conference room.

q Michael do you understand this statement is being recorded and is this with your consent
a yes
q would you give me your full name and spell it please
a Michael Crawford or Michael David Crawford - M I C H A E L - D A V I D - C R A W F O R D
q would you give me your address please
a 1919 Evergreen Park Drive, Apartment 108 and that's in Olympia
q would you give me your home phone number
a 352-2476
q would you give me your work phone number
a I'm not currently working
q would you give me your date of birth
a 11/22/77
q this is the warning and waiver of constitutional rights. You have the right to remain silent. Anything you say can be used against you in a court of law. You have the right at this time to an attorney of your own choosing and to have him or her present before and during questioning and the making of any statements. If you cannot afford an attorney you are entitled to have one appointed for you by a court without cost to you and to have him or her present before and during questioning or the making of any statement. You have the right to exercise any of the above rights at anytime before or during questioning and the making of any statement. Michael, do you understand those rights
a yes
q speak up a little bit
a yes
q Michael, I'd like you to sign right there signifying that you understand your rights
a I admit I understand that I'm waivin' my rights (document being signed)
q you've just signed the signature for the understanding of the constitutional rights and you're also, went down a little bit and signed the signature for the waiver to your rights, is that right
a yes
q what I'm gonna do though Michael is, I'm gonna read them to you, okay? I know you, you want to waive them, at least that's the indication you're giving but I want to read them to you, okay? Do you understand that
a yes
q I have, this is the waiver: I have read or have had read to me the above explanation of my constitutional rights and I understand them. I have decided not to exercise these rights at

this time. Any attached signed statements are made by me freely, voluntarily and without threats or promises of any kind. Michael, do you understand the waiver

a yes
q do you wish to waive your rights at this time
a now, does that mean that...that if I choose to take that right again, I still can or
q what, if you waive your right, it means I'm going to ask you questions. You're giving me the okay to ask you questions and you can stop talking at anytime
a okay
q even if you give me the right to ask you questions and you don't wanna answer any of those questions you don't have to. If you just wanna answer one out of maybe 20 you can do that or you can answer all 20. It's your decision
a okay
q do you understand that
a yes
q okay, does that, now you've signed your name already. I'm asking you now, do you wish to waive your rights
a yes
q okay. For goodness sakes, you have any questions you ask Detective Sergeant Costa or I, do you understand that
a yes
q okay. Detective, I'd like you to sign there as a witness (document being signed). Michael, you're married to Sylvia
a yes
q and that's Sylvia Crawford
a yes
q okay, do you and Sylvia currently live together
a yes
q okay, the reason I ask is I believe she gave me another address
a she was living at um, this guy Paul Blum's house for awhile. She just, she very recently moved back in with me
q okay, but you are married
a yes
q okay, and do you know a Mr. Kenneth Lee, I guess he goes by Kenny
a yes
q how do you know Mr. Lee
a oh, we've known each other for years from downtown originally
q drinking buddies
a that and then other things
q give me an example of other things
a I don't wanna specify on that
q okay, and does your wife Sylvia know Kenny





a yes
q how long has Sylvia known Kenny
a um, about half as long as me, about 3 years
q okay, so you've known him maybe 6 years
a yeah
q give or take? Is that yes
a yes
q okay, be sure you speak up. Did you and Sylvia walk downtown today and perhaps run into Mr. Lee or how did you run into Mr. Lee today
a we ran into him downtown
q what time
a I don't, I don't even know what time it is now. I have no idea what time it is
q it's a little bit after 8:00 o'clock now, at night
a must a been a few hours ago
q would this of been the afternoon that you ran into Kenny
a yeah, it was afternoon
q was it pre-planned that you run into him or was it by chance
a it was by chance
q and so you guys ran into Kenny Lee downtown Olympia area
a yes
q and what happened when you ran into Kenny Lee
a um....well, I asked him about some money he owed us um, he told me to come by his place
q okay, and he apparently owed you some money for perhaps some marijuana or drugs
a I (won't?) (inaudible) specify
q okay, but he owed you money for something that you had given him in the past
a we had loaned him some money so that he could
q okay, but, and he owed you money
a yes
q and you asked him if he had the money, what was his answer
a he just said he'd probably have somethin' for me and told me to come by
q his residence
a yes
q had you ever been to his residence before
a I hadn't
q do you know if Sylvia had ever been there
a um, she had told me about something that happened at one point but I wasn't sure
q okay, can you be specific as to maybe something that happened
a she had told me that he had tried something with her before. Someone else had to help fight him off her and she got away and I wasn't sure if I believed it cuz, I don't know, she's bullshitted me a few times

q when you say something happened, does that mean perhaps he had attempted something of sexual activity on her
a yes, forcefully
q okay, if that's true, why...did you agree to go to his place then after he said he might have something for you
a yes
q was Sylvia with you at the time
a yes
q did Sylvia go along with you
a yes
q did you feel uncomfortable going there when Sylvia had said previously
a somewhat
q but you went anyhow
a yeah, I figured I could handle it
q were you under the expectation that he might pay you some money
a yes
q did the three of you then walk to his residence
a yes
q do you know where his residence is
a it's the brown apartments
q do you know the address
a no
q do you know the street they're on
a um, the one that goes up by Priest Point Park by AM/PM
q by AM/PM
a yeah
q off of that street that goes towards Priest Point Park
a yes
q okay, so the three of you went to his apartment
a yes
q speak up
a yes
q okay, and did the three of you then go in the apartment
a yes
q did you go for any other reason to the apartment then just to collect money from him? Was it possibly to visit, to...do drugs, to drink beer, any other reason but to collect money
a I wouldn't specify on that
q okay. So, three of you went in the apartment
a yes
q what happened then
a well, we agreed that I was gonna go to the store...and



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q why did you agree to go to the store
a (inaudible)
q was there something missing that you needed
a yes
q what was that
a I don't wanna specify
q okay. Could it have been beer
a it could of been
q okay. So you left the residence to go get something that could of been beer
a yes
q who, did you have the money or did he give you the money
a I had some money and he gave me five bucks
q okay, and how long were you in the apartment before you agreed to go get the item
a I'm not sure
q guestimate
a guestimate. I would say under an hour but close to an hour
q okay, and let, let's approximate then 45, 50 minutes. What happened that time that you were in the apartment during that period of time
a oh, we just bullshitted and stuff, and he told he'd get paid when he got his money or that he'd pay me some, somethin' and it was all cool, and he asked Sylvia if she was mad at him. So I knew something had to of happened
q okay, so he asked Sylvia if she was mad at him and what did Sylvia say
a she said it was okay, so ya know
q did that make you a little suspicious that maybe he had attempted something
a yes
q so what you're telling me is you sat there for 45 and 50 minutes and just visited
a yeah
q is that correct
a yes
q okay, and then you decided you needed something so you took some of his, he gave you some money, you had some money and you left to go to the store
a yeah, well, he, he, he bought it up sayin' that he wanted some more ya know, and so I was like, okay
q perhaps some more beer maybe
a perhaps
q okay, continue
a and, and he, I asked him ya know, if he wanted to go to the store with me and he said he didn't wanna go anywhere so
q speak up
a I started to go and then I felt comfortable leave, uncomfortable leaving Sylvia there and I went back to go get her and I heard (inaudible) and they were fighting by the door

q okay, so you left the residence and closed the door behind you
a yeah
q and would you describe where you went from there? Do you have to go down steps or up steps
a down steps
q how many steps
a I don't know
q a lot
a enough
q 20
a maybe
q okay, and where did you go when you decided you didn't feel comfortable and you turned around to go get her? Where were you at when you turned around
a um, I was close to AM/PM
q okay, and this residence is very close to AM/PM anyhow, isn't it? Would you say you were half way to the AM/PM, a third of the way, two-thirds of the way
a I'm not sure
q okay, but you never made it to the AM/PM
a no
q okay. You decided to turn around and go back
a yeah, I started walkin' there and then I started walkin' back from the AM/PM and I was thinkin' 'Well, well, I don't know'
q speak up
a and then I decided to go back and get her
q kay, so you turned around, walked back
a yes
q what happened then
a well, I went and, I heard something inside the door and I opened the door and they were fightin' on the floor
q kay, you're at the door and what did you hear
a I heard her screaming
q what was she screaming
a I don't remember
q was it a distressful scream
a yes
q and you opened the door or did he open the door? Or how did you, how did the door open
a I honestly couldn't, honestly answer that. I, I don't know if I opened it or if he opened it or if she opened it. I don't know
q did you make any effort to knock on the door or yell in the door prior to the door opening
a I believe I said something





q think back
a (pausing) I said something to Sylvia, I don't know, something like, 'What's going on? Or what's' something, I don't know
q this is while you were outside the door
a yeah
q kay, so some way or another the door opened but you don't recall how
a I'm not positive
q when the door opened what did you see
a Kenny tryin' to hold her down...she was on the ground and he was like, on his hands and knees or on his feet squatin' down or somethin', just down lower than me
q well, so, so I guess that would indicate if Kenny was down with her that would indicate apparently you're the one that opened the door
a possibly
q okay. Let's describe the position that they were in again. Is there a wall that separates a room from the front door or could there be a wall separating any, any (inaudible)
a (pausing) I don't understand the question
q walking through, the door's open and tell me what you saw again....walking through...I think what I'll do...how about drawing me a picture. As best you can put the front door and....and label everything because we'll need to know what everything is
a (pausing to draw picture) (inaudible) here's the door right here
q okay, if that's not anything just cross that out then
a it's like a, it's like a hallway that goes in here
q okay, and what's this
a I was thinkin' the couch, but I'm not sure if it goes that way
q okay, so this is a little wall here
a yeah, there's a wall that goes this way
q okay, what's to the left as you walk in? Nothing? Just a front room
a this is the front room but I don't remember exactly where the couch was....and they were like, right here
q so where you've got them is right inside the front door
a yeah, it ended up out here somehow
q outside the front door
a yes
q okay, but let's, let's walk through what you're drawing. You opened the door and the door comes outward
a I don't remember
q but there is nothing between you and them as they come in the door, is that correct
a (pausing) as they come in the door?
q right. As, as, as he, as you come in the door you saw them plainly right inside the front door
a I don't even think I made it in the door....I think that the fight came out the door

q okay, but you said you looked in, you, and what did see, him and her on the ground
a yeah, right in the door
q right in the door area
a like she was tryin' to get out the door or somethin'
q and what position was she in
a she was on the ground tryin' to get up
q was she on her knees or on, so she was, she looked like she was tryin' to get out the door
a yeah
q and was she on her knees
a I, I don't remember
q where was he
a he was like....she was like, kinda like, right here...and he was like right here or it could a been reverse. He could a been right here and she was right here
q okay, okay, but it was your thought she was attempting to get out the door
a that was my thought
q what was he attempting to do
a he was trying to restrain her. He was yelling something, I don't remember what...fuckin' tryin' to stop her from gettin' out the door
q okay, what happened then
a I don't know, I got aggressive at that point when I seen 'em and he got aggressive also
q let's walk through what happened. Tell me what aggressive means
a I don't know, just, (inaudible) got in a fight with somebody, you start first yellin' at each other and then blows and...(inaudible) weapons, weapons start (inaudible)
q well, did, when the door was there and you said they were right inside the door, you said it ended up a little bit outside. Did he get up and confront you? Did you confront him, what happened? Remember back, let's be specific
a (pausing) I kind of (inaudible) out when stuff like this happens, I mean...I could be tellin' you something, it might not be exactly how it happened
q do you remember pulling your knife out of where it was
a I don't even remember pulling it out
q do you carry a knife
a yes
q where do you carry your knife
a on my belt
q and is it on your right side of your belt or the left side of your belt
a usually the right side
q and is it in a sheath
a yes
q and is it, is the sheath something that you would maybe button over the top or is it the type of sheath that you can just reach and pull the knife right out
a you could, you could pull it out





q okay, what kind of knife is it
a it's um, a filet knife
q a filet knife. Give me approximate length
a mmm, 6, 7 inches
q okay, do you recall pulling that out
a I recall putting it back
q into the sheath
a yes
q do you recall holding it or anything prior to that
a yes
q what do you recall
a I recall getting my hand cut and I recall swinging the knife at him...and, and then Sylvia gettin' past. Once she was past me then we escaped down through the, the stairwell and just went from there and just were like, ya know (inaudible) 'What's goin' on?' (inaudible)
q (inaudible) you recall swinging your knife, is that what you said...or pushing it or lunging it or what, what do you recall doing with your knife
a lunging, swingin'. We were backin' out the door. I don't...
q was the knife in your right hand
a yes
q so that would indicate evidently you pulled it out with your right hand
a I believe so, I'm not positive
q okay, okay. Do you recall the knife striking him or any kind of a slash or a push into him or a swing at him that struck him
a yeah, I think I stabbed him
q okay, do you recall how you stabbed him or what the motion was
a I believe it was a forward jab
q okay, do you recall if it was one occasion, two or three
a I, I know I had to of got him once
q how do you know that
a I felt, I felt, I don't know, I just felt (inaudible) ya know
q you could feel the poke into him
a yeah
q is that a good description, I don't know
a I don't know either, I
q you know you got him once though
a I know (inaudible)
q by a straight in stab
a yeah
q okay, do you recall, think back, if you got him any other times
a I might of
q you might of. Would those of been straight in stabs too, do you believe

a um, I, I'm not sure
q kay, it's possible
a I was tryin' to but he was [redacted] and he had somethin'
q kay, why were you trying to? Were you mad
a I was mad
q kay, because you thought that he was doing something to your wife
a yes
q and do you feel like your madness took over for a few minutes
a yes
q do you know how your hand got injured
a I...I think he cut me with something. I may have tried to grab something in his hand(s). I'm not positive
q do you recall him having anything in his hands
a I believe that he had something that he pulled from somewhere, one of his pockets or his belt or somethin'
q you don't know what it was
a I recall him reaching for something. I remember my hand getting cut when I went to grab his arm
q and when did he reach for something
a when we were in that confrontation of...when Sylvia was trying to get out the door, the door came open somehow and that's when he was reaching for something and that must a been when I reached for somethin'. I remember my hand gettin' cut
q do you know, when you reached for your knife and you were swinging it and/or pushing it forward and striking him, do you know if he had tried to do anything to you yet or do you know if he attempted to perhaps come after you or was your hand cut after you had uh, swung your knife at him, do you recall
a I know, I know that it took impact outside of the apartment, which meant he was coming toward me. I remember him coming towards me and I know I didn't get him till he was outside of the apartment
q okay, do you recall when your hand was injured? Was it during the altercation of you swinging the knife, could it, before or afterwards or do you remember
a I really think it was before
q okay, you're not sure or you're sure
a at, at, at the beginning of the confrontation
q okay, do you know how your hand got injuried, with what instrument
a I don't know
q did you ever see him with a knife
a I seen him pull something out of his, out of his belt. I don't know what it was
q okay
a out of his pants or whatever
q did he say anything to you





a I wouldn't remember if he did. He said something, I don't know what. I wasn't listening
q what did you say to him
a I don't remember saying anything
q was this a very fast confrontation? The door opened, before you knew it he was outside and before you knew it you guys were walking away
a it was very fast
q okay, when did you realize your hand was cut
a well, I, I felt, I felt it ya know, at the beginning of the altercation but I didn't realize it was cut until I got down the road
q you might wanna lift that up because it's bleeding pretty good (inaudible). Do you...(background activity) When did you put away the knife
a um....outside....when I felt comfortable. I, at first I just was holdin' onto it really tight and then when I, I didn't see him comin' after us and that's when I put it away
q why didn't you call police
a (pausing) I thought about it. We just walked down the street. I thought about catchin' a bus. I, I don't know, I've been in a lot of trouble and I just, I didn't know what to do. I mean, I, I thought about catchin' a bus then we decided not to catch the bus. We were thinking about calling the cops then the cops came to us
q were you going to call the police or you don't know
a I may have
q kay. When you were swinging the knife at him and lunging it into him, did you mean to hurt him? You were mad I take it
a (no audible response)
q is that yes
a yes
q okay
a I was mad
q you were very mad
a yes. I realized that what she had told me earlier must of been true too
q apparently about him trying something sexually on her
a (inaudible)
q you meant to hurt him
a (pausing) I don't know if I meant to hurt him. I...
q you were just
a probably part of me did
q you were just in a, you might say a rage
a (pausing) you might say
q okay. Detective Sergeant Costa
Costa the injury that you have to your hand, did you do that to yourself
a I don't believe so
q okay

Gies could you of? Perhaps as you were swinging and/or lunging at him could you have maybe, I don't know, been holding onto it maybe and actually sliced your own hand by accident
a I don't, I don't think I could a done that or, I mean, this is bad news. (Inaudible) he had, he pulled something out
q okay. Why do you carry a knife
a protection
q okay. Did Sylvia tell you anything after you guys left the scene as to what happened
a she was trying to but I wasn't really listenin'. I was just kind of in a panic mode
q kay. When you left what position was he in? Where was he at
a he was at the like, on the stairway, at the top of the stairway
q standing? Down? On his knees
a he was standing
q he was. Was he crouched over
a he'd got into a defensive mode after I got him once
q okay, do you know how many times you stabbed him
a no
q do you have a guess
a once, maybe twice
q okay
a (pausing) I asked her (inaudible) she said I, she thinks I got him three times
q how did you try to stop your bleeding on your hand
a I was just holdin' it with my shirt
q okay. Do you have anything you'd like to add
a no
q have we coerced you into saying any of this or threatened you or anything
a no
q kay...kay, Detective, what time is it now
Costa 8:28
Gies time is now approximately 8:28 p.m. It's still August 5th, 1999, and we'll be turning off the tape at this time.

Transcribed:
REG/JDC:jp



# APPENDIX B

This will be the statement of Sylvia Crawford. Today's date is the 5th of August, 1999. The time is 2243 hours. This statement is being recorded at the Olympia Police Department. Also present is Detective Holmes of the Olympia Police Department.

q Sylvia, do you understand this statement is being recorded, and is this with your consent
a yes
q would you give me your full name and spell your full name please
a Sylvia Margarita Crawford - S Y L V I A - M A R G A R I T A - C R A W F O R D
q and your address
a 8100 Dawn Hill Drive, Olympia, Washington 98513
q okay, you're gonna have to speak up just a little bit. Your date of birth
a 3/10/78
q do you have a home telephone number there
a 455-8738
q okay Sylvia, you've already talked to the police tonight, is that correct
a yes
q okay, and uh, you understand at this point this statement is being recorded, correct
a yes
q okay, before I ask you any questions and I explained this to you uh, earlier, but I'll go ahead and do it again. I'm gonna go through and read you your constitutional rights. You have the right to remain silent. Anything you say can be used against you in a court of law. Are you under the age of 18? No. Okay. You have the right to an attorney of your own choosing and to have him or her present before and during questioning or the making of any statements. If you cannot afford an attorney you are entitled to have one appointed for you by a court without cost to you and have him or her present before and during questioning or the making of any statements. Five: You have the right to exercise any of the above rights at anytime before or during questioning or making any statements. Now, do you understand each of those as I explained them to you
a yes
q okay. The, and I told you earlier that uh, initially when the first Detective talked to you he didn't advise you of your rights, correct
a he advised me of my rights
q did he
a he did
q okay, so you understood them then too
a yes
q okay
a and I, and I asked all the questions then
q okay, you're gonna have to sit closer to this or we're not gonna hear you...Pardon
a just wrapping up my feet
q okay um, on the bottom of this it says; I have read or have had read to me the above explanation of my constitutional rights and I understand them. I have decided not to





exercise these rights at this time and it says, any statements, it says attached statements, but we're doing a, a taped statement, are made freely, voluntarily and without threats or promises of any kind. Is that true
a yes
q okay, and I told you that you are not under arrest
a yes
q and you understand that
a yes
q and my reason for advising you of your constitutional rights was that uh, if you and I informed you that if you made a statement to me, an incriminating statement, that that statement could be used against you in a court, is that correct
a yes
q okay. I was not present the first time you were interviewed by Detective Gies
a that's right
q okay. I did sit in on an interview with your husband who is down here in our facility and I told you that, correct
a yes
q and I came back in here what, about a half hour ago and I told you that there were some inconsistencies with the story that your husband had told us and with the first story that you told the Detective. Is that true
a yes
q okay, and after we sat here for some time uh, you, I pointed out to you that I wanted the truth, is that correct
a yes
q and you asked me to tell you completely what your husband had told us and then if I did that you would uh, let me know whether that was the truth or not, is that correct
a yes
q okay, and I also told you that I wasn't gonna do that, correct
a correct
q but I did tell you some of the things that your husband told us
a yeah
q and after I told you that, you told me that you would tell me what really happened the night that you guys or what really happened tonight before you went over to this guy's house, correct
a yeah
q okay. So I'm gonna start over again and go through that. This, what was the name of this person's house that you went over again
a Kenny
q Kenny? Okay. You met Kenny in the past, correct
a yes
q okay, tell me about happened, I told you that uh, your husband had told us that you had mentioned to him that something took place between you and Kenny in the past where he

had done something sexual to you, correct

a yeah

q and you didn't tell us that the first time, right

a nope

q okay, if you can lean forward close to this or I'm not gonna be able to hear you and tell me what happened or tell me what it was and what happened between you and Kenny the first time

a the first time.....is that I came back into town and I ran into Kenny and...um...we had agreed to meet at The Reef, tavern or bar or whatever it is. Uh...and go drinking, thinking he was an old friend of ours...ya know, why not...go have a few drinks. I...was going to a job interview that day and I was gonna go have some drinks afterwards with him. In the process we, he introduced me to like three other people...and this other guy went with us. After a few drinks were bought Kenny decided it was getting a little expensive and that we should just go get a bottle and go to his place and drink. Me, I'm seeing no reason not to trust Kenny, okay ya know, why not...so we went to his apartment in Steve's truck and...we went to a liquor store first, got a bottle of vodka, went up to his apartment...Kenny sent Steve to the AM/PM on the corner right by his house to go get some orange juice to mix with the vodka...and in the process Kenny had pinned me down and...was...tearing at my clothes and I was fighting back...there were scratches on his neck. And his, his skin under my nail for a few days...that was gross, and then, anyway um...we were fighting, we didn't get along. At that point I was screaming for him to get the fuck off me. He wouldn't get off me...Steve heard me screaming through the window, ran upstairs, yelled at Kenny to let him in. Kenny didn't respond. Dude said, "I'm gonna kick your door in! I'm gonna kick your door in!" and Kenny did not still respond. Dude did kick the door in and pulled Kenny off me and I fled with the dude to his car...and went to go get some cigarettes and...for one reason or another I'm not quite sure of, we were supposed to meet up with Kenny again at the park later on that night. We were screaming, I was screaming cuz he had stolen my wallet. I think that's the only reason why we did go meet back up with him. I realized my wallet was gone when I went to go buy him a pack of cigarettes I didn't have my ID...and um...there was an officer there that made him give me my wallet back...at that point...took off again with Steve. We go to a parking lot and Steve was like, did, just, did what happen just really happen? Did it really happen? Is this really happening? And I'm like, 'Yeah, this is really happening' and he gave me his phone number. He's like 'Well, if anything is to ever come of this here's my phone number. I live in Rochester and I work at Labor Ready every day.'

q do you remember Steve's last name

a I don't. I might of written it down in my book. I know I wrote down...his name and number in my book, but that's at the house. I don't have it with me right now

q do you remember his phone number

a um um (no)

q okay. How long ago did this happen

a two weeks, a month... long than that maybe, I've only been back in town for a short bit





q okay, is this the same story that you told to the Detective earlier tonight

a no

q okay, the only difference is that you

a put Michael in Steve's place

q okay, but

a and finished off what happened instead of me just leaving

q okay, but the story you told about what happened tonight was actually the incident that happened a couple weeks, maybe a month ago

a yes

q okay. Did you tell Mike about what happened that day

a yeah

q how did he respond to that

a got very upset...he was hurt...I think that his friend had done that, had violated his trust and his respect and violated my trust and my respect...I think he felt violated just as much as I did

q okay. How did you end up back over there today

a (pausing) we were out with the baby...playing in a park with the baby and drinkin'...and one way or another a conversation... however it lead up to it...we were talkin' about something or someone mentioned Kenny...Mike, he's like 'Yeah, that dude deserves a ass whoopin'...ya know...and...we decided to go back to the apartment and drop the baby off...and um....come downtown and Mikie wanted me to show where Kenny was living where uh, where it was (inaudible)

q okay. What time were you down here, what time were you down here earlier today? What time did you start this

a we had to, it had, it had to of been before 5:30 because we called the Capital Shuttle. The Capital Shuttle's free

q okay, you said somebody mentioned Kenny's name in conversation

a it had to of been me or the friend of ours we were drinking with or Michael. Someone had mentioned his name...we all hang out with all the same people that know everyone else

q okay

a it's a pretty tight click

q and when you brought up Kenny's name did it get Michael upset

a yes...[redacted]. He was drunk. He wasn't like really drunk, he was just ya know...he was past tipsy

q okay, who's suggestion was it then to go over and square things up

a (pausing) it was his suggestion and I have to admit that I agreed

q is this the same apartment that you'd been to before

a yeah

q had Mike ever been there before

a no, apparently not if he needed me to show him where it was

q okay. What other places did you go look for him downtown

a (pausing) at his hangout spots
q can you tell me where you went
a we went to The Reef. We went to 4th Ave Tav. We went to B & R. He wasn't in any of those places so we figured that he was at home
q okay, and when you didn't find him in any of those places you went to
a his home
q and tell me what happened once you got to his home
a we knocked, I knocked on the door. Mikie was like 'That's not his apartment. That's this other guy's apartment.' I was like, 'No, this is his apartment.' He said, well, I guess it might be wrong and then I knocked on a different door...and um...but, Kenny answered the door said he wasn't receiving any company. Asked me if I was, he's like "Aren't you mad at me?" And I was like, "Yeah" and....he was....it was, and then we asked him about some...money that owed, owed us for a few years now. We knew we weren't gonna collect it but we still asked ya know, you gotta do that...and uh...we were all just standing there in the doorway....one thing lead to another, not very, didn't take
q okay, you gotta speak up
a didn't take very long for everything to happen...and then we ran downstairs, down the street and I begged Michael to catch a bus with me. I said, "Let's just catch a bus. Let's get the fudge outta here'
q when you say everything happened in the doorway, what do you mean by that
a (pausing) Kenny was stabbed
q how did Kenny get stabbed
a with a knife
q whose knife
a (pausing) maybe Michael's
q what do you mean by maybe Michael's knife
a it could of been his knife. It could of been someone else's knife
q did you see Michael stab him
a (pausing) yes, I saw Michael stab him
q did you stab him
a I did not stab him
q how many times did Michael stab him
a I think three
q okay, when you say you think, what do you mean by that
a it means I shut my eyes and I didn't really watch. I was like in shock and I think three
q what did Michael say to him when he stabbed him
a I think he called him a punk....I heard the words mother fucker....I don't quite remember what was said after that
q what else
a (pausing) well, when we were walking and the cops came and yelled for Michael and I to get on the floor and....(inaudible) I was like, "It's wet."... (inaudible) ....and I've been here ever since. They just took my clothes





q okay, I need, I need you to speak up a little bit for me
a that's it. That's it um....we saw Kenny fall down, heard him grunt. We ran like the wind as far as we could. Not as far as we could but as fast as we could...try and debate what to do next. I don't think it was all planned out what was all gonna happen or else, I think we would of talked about what we were gonna do after the fact. So I think that as far as that goes he was gonna go over there and kick his ass....I think those were the actual intentions, but since Kenny was being a punk...I think it just made Michael more angry
q was Michael mad
a infuriated
q you said infuriated
a yes, he was angry
q have you ever seen him that mad
a yeah, I've been with him for years. I've seen all sides of him
q was he in control of himself
a (pausing) I can't answer that with any.....explain more on what you think out of control (inaudible)
q would you describe, describe him as being out of control
a (pausing) no, Mike has, I don't know but he's....no...I wouldn't describe him as being (inaudible) out of control
q the first time that Mike stabbed Kenny, did you see where he stabbed him at
a (pausing) I think it was the stomach....I didn't, it was like that. It wasn't like that
q okay, the, the, hang on a minute. The tape recorder's not gonna be able to see what you're doing so you're describing his holding, his holding the knife in his hand and like punching him in the stomach with it (describing fist, thumb up, knife extending from fist toward victim)
a yes
q pardon
a yes
q okay. Did you see how many times he stabbed him after that or you're just guessing that it was two more times
a just guessing
q okay
a Mikie had asked me after we were walking, he was like, "Did you see how many times I stabbed him?" I said, "I don't know, I think you did it about three times." He's like "Three?" and I was like, "Yeah, I think so." He's like, "Do you know where this came from?" He was asking me about the cut on his hand. I was like, "Dude, I have no clue what that came from. How come you don't know?"
q did he cut himself in the process of stabbing this guy
a that's what I'm thinkin', but I'm not sure
q did Kenny do anything to fight back from this assault
a (pausing) I know he reached into his pocket....or somethin'...I don't know what
q after he was stabbed

a he saw Michael coming up. He lifted his hand...his chest open, he might of went to go strike his hand out or something and then (inaudible)
q okay, you, you gotta speak up
a okay, he lifted his hand over his head maybe to strike Michael's hand down or something and then he put his hands in his...put his right hand in his right pocket...took a step back....Michael proceeded to stab him...then his hands were like..., how do you explain this...open arms...with his hands open and he fell down...and we ran)(describing subject holding hands open, palms toward assailant)
q okay, when he's standing there with his open hands you're talking about Kenny, correct
a yeah, after, after the fact, yes
q did you see anything in his hands at that point
a (pausing) um um (no)
q okay. I asked you earlier if..
a I think he took a step back in his doorway tryin' to get back into his house, into his apartment
q okay, was there anybody else there with you when this happened
a um um (no). There might of been someone inside his apartment that's why he might of not been accepting company. I don't know. We didn't see inside of his apartment
q okay, you said there might of been somebody that's why he wasn't accepting company. When, when you knocked on the door did he answer the door right away or did he say inside he wasn't accepting company
a oh no, he answered the door. He didn't say till he um, till he realized who was there. Like I said, ever since Kenny saw me from that night forward he's been hiding from me. He's like seen me and then he goes and runs...goes and run, goes and run and goes and runs
q okay, so he saw you and Michael
a yeah. In between all of this from the time it happened at his apartment...to, to tonight, I've seen Kenny like 4 or 5, maybe 6 times and every single time and every single time I saw him he would run and hide from me, which I quite don't understand and I would kinda like go the opposite direction from which way I was comin' and try to avoid him. He opened the door, he saw Mikie and me....and then he was like, 'Well, ya know, I'm definitely not accepting any company." And we're like, 'Well, do you have any of that money that you owe us?" ya know, cuz it's like 300 bucks and he's like 'No, I don't have any of the money.' 'You owe us' and then we're like talking about ya know, how, 'How you doing? How you doing?' Ya know, back and forth and then.... when further in the conversation anyway.... and that.....was when it happened
q you said that's when it happened
a (pausing) I don't quite remember what part of the conversation, I remember there was a dead stand still and nobody talking for like a couple seconds and then it happened. I don't quite remember exactly what was said previous. I remember him asking me 'if you were mad at me' and I remember me telling him I was. I remember....talking about other things...vaguely
q okay. Are you sure that you didn't stab him





a I'm positive I did not stab him
q okay. Sylvia, is there anything else that you can think of that you wanna make known at this point
a that....I feel it was justified what happened. I feel that Mikie being my husband had a right to get hurt over the fact that his friend had tried to do that to me. I feel that..me not telling Michael about it would of been violating...a confidence and a trust in our marriage and our relationship, and I feel that that's really important to me. Michael's my best friend and I'm his...ya know, any....there isn't anything...
q is your husband a racist
a no, his not a racist
q describe his relationship with minorities
a I'm a hundred precent Mexican. His child is half Mexican
q okay. Has he ever possessed any white supremist literature
a I think someone gave him a magazine and he brought it home
q okay, but he doesn't now ordinarily practice that then
a no, gosh no, no, no Mikie's one of the most fair people you'll ever meet
q okay, anything else that you want to add at this point
a (pausing) um um (no)
q are you being completely truthful with me....this time
a I wanna add that the last time I was afraid and I told what had happened. I just took both the stories and coincided them...and tonight I just took or this time I'm just taking tonight's story
q okay, you were afraid when Detective Gies talked to you and then what you ended up doing was replacing your husband and put him into the uh, story with the first assault that happened with Kenny and you, correct
a yes
q okay. The information you gave me right now on this statement though is what actually took place
a yes
q okay. Detective Holmes, anything else
Holmes nothing
Costa Sylvia, were there any uh, threats or promises been made to you to get you to make this statement
a no
q pardon
a no
q okay. Today's date is still the 5th of August, 1999. The time is 2309.

Transcribed
JDC:jp

This will be a statement. It's concerning case number 99-6530. This will be the statement of Michael Crawford. Today's date is the 6th of August, 1999. The time is 45 minutes past midnight. This statement is being recorded at the Olympia Police Department. Also present is Detective Russ Gies.

q Mike, do you understand this statement is being recorded and is this with your consent
a yes
q would you give me your full name again and spell it please
a Michael Crawford - M I C H A E L - C R A W F O R D
q and your address
a 1919 Evergreen Park Drive
q do you have a phone number there
a um, yes, 352-2476
q okay, and uh, are you working
a no
q okay, how about your date of birth
a 11/22/77
q okay
Gies what's your apartment number
a 108
Costa okay Mike, I'm gonna go through and I'm gonna read a warning and a waiver of your constitutional rights. I know that these were read to you before, but I'm gonna go back through it again. It says: You have the right to remain silent. Anything you say can be used against you in a court of law. You're not under the age of 18, correct
a correct
q okay. You have the right at this time to an attorney of your own choosing and have him or her present before and during any questioning or the making of any statements. If you cannot afford an attorney you are entitled to have one appointed for you by a court without cost to you and have him or her present before and during questioning or the making of any statements. You have the right to exercise any of the above rights at anytime before or during questioning or the making of any statements. Do you understand each of those rights as I've explained then to you
a yes
q okay, do you have any questions about any of them
a (pausing) um, no
q okay. On the bottom again, another statement, it says: I have read or have had read to me the above explanation of my constitutional rights and I understand them. It says, I've decided not to exercise these rights at this time. It says, any attached signed statements are made freely, voluntarily without threats or promises of any kind. Since we're obviously not doing any kind of a signed statement, and we're doing it by uh, tape recording again, is this with your consent and uh, it is freely, voluntarily and being done





without any threats or promises
a yes
q okay. We came and got you about 5 minutes ago, correct
a yes
q and I told you that um, obviously I sat through an interview that you did with Detective Gies earlier and I also um, had some idea as to a conversation that he had with your wife. You two were involved in an incident that took place earlier tonight where a subject was stabbed, is that correct
a yes
q okay, and I told you just a little while ago that there was obviously some inconsistencies in the statement that you gave us and the statement your wife gave us and uh, she clarified some of the uh, facts. I told you that some of the things you told us was truthful and then some other things you told us weren't truthful, is that correct
a yes
q and I told you at this point what I would like to do is to hear from you exactly what took place this evening...in the area of the truth and not the inconsistencies that we got earlier, is that correct
a yes
q okay. What you told the Detective earlier tonight when you talked to him is not the whole truth about what happened, is that correct
a yes
q okay. Let's take this thing back from the uh, start of earlier tonight and where, where were you guys at before you ended up over at Kenny's house
a downtown
q okay, you were downtown with your wife and child
a no, my child wasn't with me downtown
q okay, were you guys at a park earlier today
a yeah, we were over at um...my friend's house and he had a um, playground and shit
q okay, what, tell me about the conversation you had. Tell me how you got on the topic of Kenny or how he came up, his name came up
a I talked to him about him trying to rape her
q okay, when did this attempted rape occur
a um...while we were broken up and she was comin' up back here to try to get back with me
q okay, do you remember how long ago that was
a no, I don't
q okay, was it a week ago, two weeks ago, three weeks ago, longer
a it was longer than three weeks ago. It was like a month, month or two ago
q okay, and you, you and your wife were split up at that point
a yeah
q okay, and she told you something happened between her and Kenny
a yes

q okay, tell me about the story. Tell me what she told you happened
a well, first she thought that I'd got, got Kenny to try to rape her or somethin' and, and I was like, no way, ya know, ya know, I'll kick his ass, somethin' ya know, I just...I, I didn't, I couldn't understand why she'd think somethin' like that ya know, and she said that he told her that and was yelling stuff about me like I told him to do it...and so, and I haven't seen him in all this time till up to today
q okay, so sometime ago your wife told you that when you were separated that he did or he made an attempt at raping her and you were upset with him about that
a yes
q okay. What happened today that led up to this incident that you had with him? Where were you guys at when his name first got mentioned
a we were at my friend's house
q okay, who, who is your friend
a Chris's
q Chris
a Martin
q Chris Martin. Where does Chris live
a in some apartments next to the apartments that we lived in
q okay, and you were over there this afternoon about what time
a I don't know
q okay, and then how did Kenny's name come up
a I don't remember
q okay, when his name came up in conversation what did that do for you
a it made me mad, mad
q okay, how mad
a like [redacted]
q okay, is that what you guys did at that point
a yes
q what, what did you do with your child
a we dropped him off at Ray and Brandy's house
q at Ray and Brandy
a where I live
q okay, friends of yours
a yeah
q okay, and then who took off to go find Kenny
a we both did
q okay, you have to tell me who we both, who do you mean
a me and Sylvia
q okay, do you remember about what time you started to look for him
a no
q okay, at the point you started to go out and look for him, did you intend to stab him at





that point
a no
q you were just gonna go find him and do what
a just, I don't know, I just wanted to confront him on it and I don't know, take it from there
q okay. You, you said earlier you were mad enough to kick his ass
a yeah
q okay, is that what you were gonna do? Is that what you intended to do
a (pausing) I wasn't sure
q okay, but you were upset about what had taken place before involving your wife, correct
a yes
q okay, where, where did you go to find him
a huh?
q where did you go to find him
a to where she, the apartment she said it happened at
q okay, had you ever been to that apartment before
a not, not when he lived there
q okay, so you didn't know where he lived
a no
q okay, is that why you took your wife with you
a yeah
q okay
a and I wanted to confirm stories and everything
q okay, before you went to the apartment where did you go look for him then
a (pausing) um...we stopped in a couple bars
q do you remember the bars
a uh...I know The Reef was one of 'em
q okay, do you remember any of the other ones
a uh, 4th Ave I think...is the name of it
q 4th Avenue Tavern
a yeah
q okay, anything else
a uh, B & R
q what's, now what's B & R
a Bread and Roses
q Bread and Roses. Are these places he normally hangs out at
a uh...yeah, I guess
q okay, and you didn't find him there
a no
q do you remember if you talked to anybody or saw anybody at these places
a no
q did you ask anybody when you went in there if they knew Kenny or knew where he was at

a I don't remember
q okay, when you didn't find him at those places then where did you go
a um, to the apartments
q okay, tell me what happened once you got to the apartment
a um, we went up and knocked on the wrong door and he ended up comin' out into the hallway
q okay, is there two doors at the top of the stairs
a there was three. There's, there's one...that's like....the top of the stairs is like this and there's a door here and a door here, and a door here...and we came and we knocked on this door...and then he came out of this door
q okay. When he came out of the door, what did you guys say to each other
a well, at first I asked him about the money that he had owed us ya know, he had owed us for a few years. It's kinda not really a big deal anymore. I've kinda wrote it off ya know, but um...I didn't even have to ask him what happened with Sylvia cuz he, he already started askin' her if she was mad at him and stuff...and that told me right there that there was some truth to what she was sayin' and shit and ya know, then I, I, I started in at him fuckin' ya know, sayin' 'What the fuck dude? What'd you do?' ya know, and he started gettin' a attitude and fuckin' one thing lead to another and fuckin' we got into a altercation and I stabbed him
q okay, tell me what was going, tell me what was going through your mind when he, when he uh, started arguing with you at that point
a well
q tell me what you were feeling
a I was feeling angry and fuckin'...scared and...just...the whole combination. Just adrenalin goin' through me and....
q where, where was uh, Sylvia when you first stabbed him
a um.....I'm not sure, somewhere close
q okay. I'm, I'm gonna ask you a question now, and I'm not doing it to offend you or anything, but is there any chance at all that Sylvia stabbed him
a (pausing) I wouldn't say that
q okay, what do you mean you wouldn't say that
a even if she did, I wouldn't say I'm just being honest
q well, I, I understand that she was upset with him....you're telling me that you stabbed him, right
a (pausing) I believe so
q okay, what do you mean by you believe so
a (no audible response)
Gies be honest with us Mike
a (no audible response)
q come on
a (long pause) I don't know if I can do this





Costa well, I know it's tough, but again, it has to do with the truth, and you're...
a (sighing)
q I have my idea as to how I think it happened, and I guess what I'm saying to you is, is that are you, are you willing to take the blame for something that maybe you didn't do
a (no audible response)
Gies help us out Michael, tell us the truth
a (no audible response)
Costa how did Kenny get stabbed
a (pausing) when we all started fightin' and he got stabbed
q okay, what do you mean we all started fighting
a well, it was...she was right there in the mix of it all, it was really dark in there
q who had the knife
a (pausing) I had the knife
q what hand was your knife in
a I don't remember
q you don't remember if it was in your left hand, your right hand
a no
q how many times did you stab him
a I don't know
q you don't remember
a um um (no)
q do you remember the first time you stabbed him
a (pausing) it was really dark
q okay, but you don't need to see no matter how dark it is to know how many times you stabbed him. Do you know what I'm saying? And we've already gone over the hump with the truth of the incident of why you went over there in the first place and it had to do because this guy had done something to your wife and you were upset with him. You told us you were aggravated. You didn't deny that. You didn't uh, when you first sat down with the Detective, you didn't deny that you were mad. You turned around and told him that you were enraged, and that's understandable. I guess at this point is, is that I'm, I'm ju[illegible]oking for the truth as to what happened. I mean, you're not arguing that you didn't st[illegible]his guy, you're not arguing that you were upset, but we've got some minute details that aren't clear and that's what I'm asking you
a where did you come up with that she stabbed him?...can I have some more water, please
Gies sure
Costa that's what I'm asking you
a (pausing) I didn't see her stab anybody
q okay. How did you cut your hand
a I honest to god don't really know the truth to that question
Gies did you grab Kenny, maybe grabbed onto his shirt or onto his body
a probably

a probably
q during the confrontation
a probably
Costa okay, Mike, let me, let, let me ask you a question. I know why you went over there now um, what did uh, what did Kenny do after he was stabbed
a he started, just kept fightin'
q okay. Did you ever see anything in his hands
a I think so, but I'm not positive
q okay, when you think so, what do you mean by that
a I could a swore I seen him goin' for somethin' before, right before everything happened. He was like reachin', fiddlin' around down here and stuff...and I just...I don't know, I think, this is just a possibility, but I think, I think that he pulled somethin' out and I grabbed for it and that's how I got cut...but I'm not positive. I, I my mind goes blank when things like this happen. I mean, I just, I remember things wrong, I remember things that just doesn't, don't make sense to me later
q okay
a I don't know why
q okay. Let me ask you a question then going back over the details tonight. Are you clear about why you guys went over there
a yeah
q you're clear about the details up to that
a yeah
q the stops you made at the other bars and the taverns looking for him
a yeah
q okay
Gies why Sylvia, do you think, is as upset as you when you guys walked over there
a (pausing) yeah
q did she express her anger or attitude that we're gonna go kick his butt
a (pausing) I don't remember
q but she was upset
a she was upset
q she certainly knew that you were going over there with the intention of making things right
a yeah
q be honest with you Michael, with us...did, did she have possession of the knife? Please be honest
a (pausing) I don't know
q could she of had possession of the knife
a she could of
q and how would she have gotten possession of the knife
a (pausing) I don't know





q I mean, I'm trying to figure out a scenario of her pulling it out of your sheath or it would make more sense if, I guess, if you handed it to her before knocking on the door or something of that nature
a I wouldn't, I wouldn't hand her the knife
q you would not
a I would not hand her the knife
q okay, did she take it out of your sheath Michael
a I could see her doing that if I would if I would of got into a altercation
q do you recall taking the knife out of your sheath
a I don't remember takin' the knife out of my sheath
q okay. Do you recall one of the three stab wounds being made by her or two of the three or three of the three? Be honest
a I don't, I don't recall
Costa okay. Mike, is there any uh, not to prolong this, is there any doubt in your mind about the things we've talked about earlier, about how you ended up over there
a about how we ended up over there?
q right
a (no audible response)
q is that clear
a it's not real clear. I know that we stopped and looked in some bars and that we stopped and looked in B & R
q okay, and you're clear about that
a yeah, I'm clear about that
q okay, and you're clear about being angry and going over there to try to...even up the situation with what he did to your wife from a prior incident
a yeah um, part of it, I wasn't sure if I believed it or not, I needed, I needed hear, hear from him ya know...I needed to see what he said
q okay, and once you heard what he said
a oh, I started talkin' shit and he started talkin' shit, and...we got in a fight
q and then he got stabbed
a yeah
q okay
Gies Mike, do you carry that knife pretty much all the time
a sometimes I do, sometimes I don't
q how long have you carried it on and off
a um, a few months
q why
a protection
q are you familiar with it? I mean, you're, you carry it on and off, you're familiar with how to grab it and use it
a well, I've never had to use it in a situation before

a well, I just...um, actually she bought that knife for me down in Portland...it's just the only knife I've had
q okay
Costa Mike, anything else you think you need to add to this statement at this point
a (pausing) um....(long pause) _____...no
Gies Mike, be honest with us please. Did she use the knife too
a (pausing) did she use the knife too?...I, I really don't think so
Costa okay, anything else Mike
a huh?
q anything else you need to add to this statement
a (pausing) um....no
Gies let me ask one more question Detective. Do you specifically recall stabbing him the three times
a I don't, I, actually I blacked out through the whole thing
q do you specifically recall the first time though
a I really, actually, I don't. I had asked, I had asked the nurse in the hospital is how I really found out. I asked the nurse. I go, 'Did I, did I get him?'...and she said, 'Yeah, you got him.'
q okay
Costa okay, this will uh, conclude the statement. Today's date is still the 6th of August, 1999. The time is 1:07
Gies be turning off the tape at this time.

Transcribed:
JDC/REG:jp



# APPENDIX C

FILED
IN COUNTY CLERK'S OFFICE
THURSTON COUNTY, WA

99 NOV 24 A9:52

BETTY J. GOULD, CLERK

BY _____ DEPUTY

*IN THE SUPERIOR COURT OF WASHINGTON*
*IN AND FOR THURSTON COUNTY*

NO. 99-1-1889-7

STATE OF WASHINGTON,
Plaintiff,

vs.

SYLVIA MARGARITA CRAWFORD
WFA;5'3";100#;HZL; BRN;
DOB: 03-10-78
SID: 19680423
C/O THURSTON COUNTY JAIL
OLYMPIA WA 98502
BOOKING NO. B83238
Defendant.

**INFORMATION**

ROBERT LUND
Deputy Prosecuting Attorney

**CO-DEFENDANT:**
NONE

Comes now the Prosecuting Attorney in and for Thurston County, Washington, and charges the defendant with the following crime:

**RENDERING CRIMINAL ASSISTANCE IN THE FIRST DEGREE, RCW 9A.76.070**

In that the defendant, SYLVIA MARGARITA CRAWFORD, in the County of Thurston, State of Washington, on or about the 5th day of August, 1999, with intent to prevent, hinder, or delay the apprehension or prosecution of MICHAEL CRAWFORD who she knew had committed or was being sought by law enforcement officials for the commission of a Class "A" felony, to-wit: First Degree Assault, prevented or obstructed, by use of deception, anyone from performing an act that might aid in the discovery or apprehension of such person.

DATED this 23 day of NOVEMBER, 1999.

ROBERT LUND, WSBA #23177
Deputy Prosecuting Attorney

W.S.P. IDENT.
005265720

OK

EDWARD G. HOLM
Thurston County Prosecuting Attorney
2000 Lakeridge Drive S.W.
Olympia, WA 98502
(360) 786-5540 Fax (360) 754-3358



# APPENDIX D

FILED
[illegible] COUNTY WA

99 DEC 8 P4: 13

[illegible] GOULD, CLERK

*IN THE SUPERIOR COURT OF WASHINGTON IN AND FOR THURSTON COUNTY*

NO. 99-1-1889-7

STATE OF WASHINGTON,
Plaintiff,

vs.

SYLVIA MARGARITA CRAWFORD
WFA;5'3";100#;HZL; BRN;
DOB: 03-10-78
SID: 19680423
C/O THURSTON COUNTY JAIL
OLYMPIA WA 98502
BOOKING NO. B83238
Defendant.

***FIRST AMENDED***
**INFORMATION** ~~DEPUTY~~

ROBERT LUND
Deputy Prosecuting Attorney

**CO-DEFENDANT:**
NONE

Comes now the Prosecuting Attorney in and for Thurston County, Washington, and charges the defendant with the following crime:

**COUNT I: ASSAULT IN THE SECOND DEGREE, RCW 9A.36.021(1)(a) & (1)(c)**

In that the defendant, SYLVIA MARGARITA CRAWFORD, as a principal or an accomplice, in the County of Thurston, State of Washington, on or about the 5th day of August, 1999, did intentionally assault Kenneth Lee with a deadly weapon, to-wit: a knife, and thereby recklessly inflict substantial bodily harm.

**COUNT II: RENDERING CRIMINAL ASSISTANCE IN THE FIRST DEGREE, RCW 9A.76.070**

In that the defendant, SYLVIA MARGARITA CRAWFORD, in the County of Thurston, State of Washington, on or about the 5th day of August, 1999, with intent to prevent, hinder, or delay the apprehension or prosecution of another person who she knew had committed a crime or is being sought by law enforcement officials for the commission of a crime, prevented or obstructed, by use of deception, anyone from performing an act that might aid in the discovery or apprehension of such person, rendered criminal assistance to a person who committed a class A felony, to-wit: assault in the first degree while armed with a deadly weapon.

DATED this 8 day of DECEMBER, 1999.

ROBERT LUND, WSBA #23177
Deputy Prosecuting Attorney

W.S.P. IDENT.
005265720

EDWARD G. HOLM
Thurston County Prosecuting Attorney
2000 Lakeridge Drive S.W.
Olympia, WA 98502
(360) 786-5540 Fax (360) 754-3358

OK



# APPENDIX E

FILED
SUPERIOR COURT
THURSTON COUNTY, WASH.

00 JAN 18 PM 2:13

BETTY J. GOULD, CLERK

BY _____ DEPUTY

***IN THE SUPERIOR COURT OF WASHINGTON IN AND FOR THURSTON COUNTY***

STATE OF WASHINGTON,
Plaintiff,

vs.

SYLVIA MARGARITA CRAWFORD
WFA;5'3";100#;HZL; BRN;
DOB: 03-10-78
SID: 19680423
C/O THURSTON COUNTY JAIL
OLYMPIA WA 98502
BOOKING NO. B83238
Defendant.

NO. 99-1-1889-7

***SECOND AMENDED***
**INFORMATION**

ROBERT LUND
Deputy Prosecuting Attorney

**CO-DEFENDANT:**
NONE

Comes now the Prosecuting Attorney in and for Thurston County, Washington, and charges the defendant with the following crime:

**COUNT I: ASSAULT IN THE THIRD DEGREE, RCW 9A.36.031 (1)(f)**

In that the defendant, SYLVIA MARGARITA CRAWFORD, in the County of Thurston, State of Washington, on or about the 5th day of August, 1999, with criminal negligence did cause bodily harm accompanied by substantial pain that did extend for a period sufficient to cause considerable suffering to Kenneth Lee.

**COUNT II: RENDERING CRIMINAL ASSISTANCE IN THE FIRST DEGREE, RCW 9A.76.070**

In that the defendant, SYLVIA MARGARITA CRAWFORD, in the County of Thurston, State of Washington, on or about the 5th day of August, 1999, with intent to prevent, hinder, or delay the apprehension or prosecution of another person who she knew had committed a crime or is being sought by law enforcement officials for the commission of a crime, prevented or obstructed, by use of deception, anyone from performing an act that might aid in the discovery or apprehension of such person, rendered criminal assistance to a person who committed a class A felony, to-wit: assault in the first degree while armed with a deadly weapon.

DATED this 18 day of JANUARY, 2000.

W.S.P. IDENT.
005265720

ROBERT LUND, WSBA #23177
Deputy Prosecuting Attorney

EDWARD G. HOLM
Thurston County Prosecuting Attorney
2000 Lakeridge Drive S.W.
Olympia, WA 98502
(360) 786-5540 Fax (360) 754-3358



# APPENDIX F

SUPERIOR COURT OF WASHING
COUNTY OF THURSTON

STATE OF WASHINGTON, Plaintiff,

v.

SYLVIA MARGARITA CRAWFORD
Defendant.
Booking No. B83238
SID: 19680423
FBI: NONE
If no SID, use DOB: 03-10-78

W.S.P. IDENT.
005265720

No. 99-1-1889-7

FILED
SUPERIOR COURT
THURSTON COUNTY WASH.
00 FEB 15 A9:26

**JUDGMENT AND SENTENCE** (JS)
[ ] Prison
[X] Jail One Year or Less
[ ] First Time Offender
[ ] Special Sexual Offender Sentencing Alternative
[ ] Special Drug Offender Sentencing Alternative

## I. HEARING

1.1 A sentencing hearing was held on February 15, 2000, and the defendant, the defendant's lawyer and the deputy prosecuting attorney were present.

## II. FINDINGS

There being no reason why judgment should not be pronounced, the Court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on JANUARY 18, 2000 by [X] plea [ ] jury verdict [ ] bench trial of:

| COUNT | CRIME | RCW | DATE OF CRIME |
|---|---|---|---|
| ONE | ASSAULT, THIRD DEGREE | 9A.36.031(1)(f) | AUGUST 5, 1999 |
| TWO | RENDERING CRIMINAL ASSISTANCE, FIRST DEGREE | 9A.76.070 | AUGUST 5, 1999 |
| | | | |
| | | | |
| | | | |
| | | | |

as charged in the (SECOND AMENDED) Information

[ ] Additional current offenses are attached in Appendix 2.1
[ ] A special verdict/finding for use of **a firearm** was returned on Count(s)_____ RCW 9.94A.125, .310
[ ] A special verdict/finding for use of **a deadly weapon other than a firearm** was returned on Count(s) _____. RCW 9.94A.125, .310
[ ] A special verdict/finding of **sexual motivation** was returned on Count(s) _____. RCW 9.94A.127
[ ] A special verdict/finding for **Violation of the Uniform Controlled Substances Act** was returned on Count(s)_____, RCW 69.50.401 and RCW 69.50.435, taking place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, in a public transit vehicle, or in a public stop shelter.
[ ] The defendant was convicted of **vehicular homicide** which was proximately caused by a person driving a vehicle while under the influence of intoxicating liquor or drug or by the operation of a vehicle in a reckless manner and is therefore a violent offense. RCW 9.94A.030

[ ] Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.400):

[ ] Other current conviction listed under different cause numbers used in calculating the offender score are (list offense and cause number):



IASS 99-9-10181-6

OK

2.2 **CRIMINAL HISTORY:** Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.360)

| CRIME | DATE OF SENTENCE | SENTENCING COURT (County & State) | DATE OF CRIME | A or J Adult or Juv. | TYPE OF CRIME |
|---|---|---|---|---|---|
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |

[ ] Additional criminal history is attached in Appendix 2.2

[ ] The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.360

[ ] The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.360):

2.3 **SENTENCING DATA:**

| COUNT NO. | OFFENDER SCORE | SERIOUSNESS LEVEL | STANDARD RANGE (not including enhancements) | Plus enhancement for Firearm (F), other deadly weapon finding (D), or VUCSA (V) in a protected zone | Total STANDARD RANGE (including enhancements) | MAXIMUM TERM |
|---|---|---|---|---|---|---|
| I | 0 | III | 1-3 mo | - | 1-3 mo. | 5 Years (c) |
| II | N/A | N/A | 0-12 mo. | - | 0-12 mo. | 1 Year (6m) |
| | | | | | | |

[ ] Additional current offense sentencing data in Appendix 2.3

2.4 [ ] **EXCEPTIONAL SENTENCE:** Substantial and compelling reasons exist which justify an exceptional sentence [ ] above [ ] within [ ] below the standard range for

Count(s)_____. Findings of fact and conclusions of law are attached in Appendix 2.4. The Prosecuting Attorney [ ] did [ ] did not recommend a similar sentence.

2.5 **ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS.** The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.142

[ ] The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.142):_____

2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are [ ] attached [ ] as follows: _____

## III. JUDGMENT

3.1 The defendant is **GUILTY** of the Counts and Charges listed in paragraph 2.1 and Appendix 2.1

3.2 [ ] The Court **DISMISSES** Counts _____

3.3 [ ] The defendant is found **NOT GUILTY** of Counts _____

## IV. SENTENCE AND ORDER

**IT IS ORDERED:**

4.1 Defendant shall pay to the Clerk of the Court

$ 737.84 Restitution to: DEPT. OF Labor & Industries - Victim comp program

JASS CODE $_____ Restitution to: P.O. Box 44520, Claim ID = VS 04727

RTN/RJN $_____ Restitution to: Olympia, WA 98504
(Name and Address-address may be withheld and provided confidentially to Clerk's Office)

PCV $ 500 Victim Assessment RCW 7.68.035

CRC $ 110 Court costs, including: RCW 9.94A.030, 9.94A.120, 10.01.160, 10.46.190
Criminal Filing fee $ 110 FRC
Witness costs $_____ WFR
Sheriff service fees $_____ SFR/SFS/SFW/SRF
Jury demand fee $_____ JFR
Other $_____

PUB $_____ Fees for court appointed attorney RCW 9.94A.030

WRF $_____ Court appointed defense expert and other defense costs RCW 9.94A.030

FCM $_____ Fine RCW 9A.20.021; [ ] VUSCA additional fine deferred due to indigency RCW 69.50.430

CDF/LDI/ FCD/NTF/SAD/SDI $_____ Drug enforcement fund of _____ RCW 9.94A.030

CLF $_____ Crime lab fee [ ] deferred due to indigency RCW 43.43.690

EXT $_____ Extradition costs RCW 9.94A.120

$_____ Emergency response costs (Vehicular Assault, Vehicular Homicide only, $1,000 maximum) RCW 38.52.430

$_____ Other costs for: _____

**$1347.84 TOTAL** RCW 9.94A.145

[X] The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.142. A restitution hearing:
[ ] shall be set by the prosecutor
[X] is ~~scheduled for~~ RESERVED

[ ] **RESTITUTION**. Schedule attached, Appendix 4.1

[X] Restitution ordered above shall be paid jointly and severally with:

| NAME of other defendant | CAUSE NUMBER | (Victim Name) | (Amount$) |
|---|---|---|---|
| RJN MICHAEL D. CRAWFORD | 99-1-1205-8 | KENNETH LEE | $ 737.84 |
| | | | |
| | | | |

[ ] The Department of Corrections may immediately issue a Notice of Payroll Deduction. RCW 9.94A.200010



All payments shall be made in accordance with the policies of the clerk and on a schedule established by the Department of Corrections, commencing immediately, unless the court specifically sets forth the rate here: Not less than $ _____ per month commencing _____. RCW 9.94A.145

[ ] In addition to the other costs imposed herein the Court finds that the defendant has the means to pay for the cost of incarceration and is ordered to pay such costs at the statutory rate. RCW 9.94A.145

[X] The defendant shall pay the costs of services to collect unpaid legal financial obligations. RCW 36.18.190

The financial obligations imposed in this judgment shall bear interest from the date of the Judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73

4.2 [ ] HIV TESTING. The Health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. RCW 70.24.340

[ ] DNA TESTING. The defendant shall have a blood sample drawn for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county of Department of Corrections, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754

4.3 The defendant shall not use, own, or possess firearms or ammunition while under the supervision of the Department of Corrections. RCW 9.94A.120

4.4 The Defendant shall not have contact with KENNETH LEE (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for 5 years (not to exceed the maximum statutory sentence.).

[ ] Domestic Violence Protection Order or Anti-Harassment Order is attached as Appendix 4.4.

4.5 **OTHER**: OBLIGATIONS OF THE DEFENDANT:

1. OBTAIN DRUG EVALUATION AND FOLLOW TREATMENT.
2. NO USE OF CONTROLLED SUBSTANCES WITHOUT A PRESCRIPTION.
3. UNDERGO RANDOM UA'S.
4. HAVE NO FURTHER LAW VIOLATIONS.

4.6 **JAIL ONE YEAR OR LESS**. *[ Do not use if Using "First Offender" Option]* The defendant is sentenced as follows:

(a) **CONFINEMENT**. RCW 9. Defendant is sentenced to the following term of confinement in the custody of the custody of the county jail:

3 ~~days~~/months on Count I _____ days/months on Count ____

9 ~~days~~/months on Count II _____ days/months on Count ____

_____days/months on Count _____ _____ days/months on Count ____

Actual number of ~~days~~/months of total confinement ordered is: 9

All counts shall be served concurrently, except for the following which shall be served consecutively: _____

The sentence herein shall run consecutively with the sentence in cause number(s) _____

but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.400

Confinement shall commence immediately unless otherwise set forth here: _____

[ ] **PARTIAL CONFINEMENT**. Defendant may serve the sentence, if eligible and approved, in partial confinement in the following programs, subject to the following conditions: JAIL time does not commence until space available

[ ] work crew RCW 9.94A.135 [X] home detention RCW 9.94A.180, .190 = 6 months

[X] work release RCW 9.94A.180 = 3 months (or all on work release if defendant chooses) in OPTION Program

[ ] **ALTERNATIVE CONVERSION**. RCW 9.94A.380. _____days of total confinement ordered above are hereby converted to hours of community service (8 hours = 1 day, nonviolent offenders only, 30 days maximum) under the supervision of the Department of Corrections to be completed on a schedule established by the defendant's community corrections officer but not less than _____hours per month

[ ] **Alternatives to total confinement** were not used because of: _____
[ ] criminal history [ ] failure to appear (finding required for nonviolent offenders only) RCW 9.94A.380

(b) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.120. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: _____

4.7 **COMMUNITY SUPERVISION**. RCW 9.94A.120. Defendant shall serve 24 months (up to 24 months) in community supervision. Defendant shall report to the Department of Corrections, 3700 Martin Way Suite 104 Olympia WA 98504-1121 _____(address of office) not later than 72 hours after release from custody and the defendant shall comply with the instructions, rules and regulations of the Department for the conduct of the defendant during the period of community supervision, shall obey all laws, and shall comply with any other conditions of community supervision stated in this Judgement and Sentence:

[X] remain within prescribed geographical boundaries: [X] notify the court or community corrections officeradvance of any change in defendant's address or employment

The conditions of community supervision shall begin immediately unless otherwise set forth here: _____

4.8 **OFF LIMITS ORDER** (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the County Jail or Department of Corrections: _____

## V. NOTICES AND SIGNATURES



5.1 **COLLATERAL ATTACK ON JUDGMENT**. Any petition or motion for collateral attack on this judgment and sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea,motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090

5.2 **LENGTH OF SUPERVISION**. The defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to ten years from the date of sentence or releasee from confinement, whichever is longer, to assure payment of all legal financial obligations. RCW 9.94A.145.

5.3 **NOTICE OF INCOME-WITHHOLDING ACTION.** If the court has not ordered an immediate notice of payroll deduction in paragraph 4.1, you are notified that the Department of Corrections may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.200010. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.200030

5.4 **RESTITUTION HEARING**.
[ ] Defendant waives any right to be present at any restitution hearing (sign initials): _____

5.5 Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. RCW 9.94A.200

**Cross off if not applicable:**

5.6 **FIREARMS**. You may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The court clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification, to the Department of Licensing along with the date of conviction or commitment). RCW 9.41.040, 9.41.047

~~5.7 **SEX OFFENDER REGISTRATION**. RCW 9A.44.130, 10.01.200. Because this crime involves a sex offense, you are required to register with he sheriff of the county of the state of Washington where you reside. You must register immediately upon being sentenced unless you are in custody, in which case you must register within 24 hours of your release.~~
~~If you leave the state following your sentencing or release from custody but later move back to Washington, you must register within 30 days after moving to this state or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections.~~
~~If you change your residence within a county, you must send written notice of your change of residence to the sheriff within 10 days of moving. If you change your residence to a new county within this state, you must register with he sheriff of the new county and you must give written notice of your change of address to the sheriff of the county where last registered, both within 10 days of moving. If you move out Washington state, you must also send written notice within 10 days of moving to the county sheriff with whom you last registered in Washington state.~~

5.8 **OTHER**: _____

Done in Open Court in the presence of the defendant this date: FEBRUARY 15, 2000

JUDGE Print name: RICHARD A. STROPHY

Deputy Prosecuting Attorney
WSBA#23177
Print name: ROBERT LUND

Attorney for Defendant
WSBA#15990
Print name: JEAN MEYN

Defendant

Translator signature/Print name: _____
I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the _____ language, which the defendant understands. I translated this Judgment and Sentence for the defendant into that language.

CAUSE NUMBER of this case: 99-1-1889-7.

I, Betty L. Gould, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action, now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date: _____.

Clerk of said County and State, by: _____, Deputy Clerk

**IDENTIFICATION OF DEFENDANT**

SID No. 19680423 (If no SID take fingerprint card for State Patrol) Date of Birth 03-10-78

FBI No. NONE Local ID No. B83238

PCN No. _____ Other _____

Alias name, SSN, DOB: _____

| **Race:** | | | **Ethnicity:** | **Sex:** |
|---|---|---|---|---|
| [ ] Asian/Pacific Islander | [ ] Black/ African-American | [X] Caucasian | [ ] Hispanic | [ ] Male |
| [ ] Native American | [ ] Other: _____ | | [ ] Non-hispanic | [X] Female |

**FINGERPRINTS** I attest that I saw the same defendant who appeared in Court on this document affix his or her fingerprints and signature thereto.

Clerk of the Court: Darlene Tiffany, Deputy Clerk. Dated: 2-15-00

**DEFENDANT'S SIGNATURE:** Sylvia M. Crafd

| Left 4 fingers taken simultaneously | Left Thumb | Right Thumb | Right 4 fingers taken simultaneously |
|---|---|---|---|
| | | | |



# APPENDIX G

Supreme Court of Washington,
En Banc.

STATE of Washington, Petitioner,
v.
Michael D. **CRAWFORD**, Respondent.

No. 71683-8.

Argued March 5, 2002.
Decided Sept. 26, 2002.

Defendant was convicted, after a jury trial in the Superior Court, Thurston County, Richard A. Strophy, J., of first-degree assault while armed with deadly weapon. Defendant appealed. The Court of Appeals reversed. Review was granted. The Supreme Court, Bridge, J., held that: (1) defendant's assertion of marital privilege did not waive his confrontation rights as to his wife's hearsay statements, and (2) the wife's hearsay statements were sufficiently reliable to be admitted under the Confrontation Clause.

Court of Appeals reversed; conviction reinstated.

West Headnotes

[1] Criminal Law ⇐662.80
110k662.80

Defendant did not waive his Confrontation Clause rights regarding his wife's tape-recorded hearsay statements to police officers, which were admitted in the prosecution for assault, where defendant exercised his marital privilege to prevent his wife from testifying. U.S.C.A. Const.Amend. 6; West's RCWA 5.60.060(1).

[2] Criminal Law ⇐662.80
110k662.80

Courts are hesitant to accept waiver of a defendant's Sixth Amendment confrontation rights, because of their significance in the trial process. U.S.C.A. Const.Amend. 6.

[3] Criminal Law ⇐662.80
110k662.80

A defendant may waive the right to confront witnesses against him when his own misconduct is responsible for a witness' unavailability at trial. U.S.C.A. Const.Amend. 6.

[4] Criminal Law ⇐662.8
110k662.8

Simply because an extrajudicial statement falls within a hearsay exception does not mean that it will satisfy the Sixth Amendment right to confrontation; therefore, the court will employ specific safeguards to ensure that the proffered evidence offers some reliability in terms of the declarant's perception memory, and credibility, which is a function traditionally performed by cross-examination. U.S.C.A. Const.Amend. 6.

[5] Criminal Law ⇐662.8
110k662.8

Hearsay statements, to be admissible under the Confrontation Clause, must be admissible under the rules of evidence, and the statements must contain sufficient indicia of reliability and trustworthiness. U.S.C.A. Const.Amend. 6.

[6] Criminal Law ⇐662.8
110k662.8

Admissibility under a firmly-rooted exception to the hearsay rule will satisfy the requirement that extrajudicial statements must contain sufficient indicia of reliability and trustworthiness, as element for admission under Confrontation Clause. U.S.C.A. Const.Amend. 6.

[7] Criminal Law ⇐662.8
110k662.8

If the hearsay exception under which the extrajudicial statements are admissible is not firmly rooted, then the court will consider the following nonexclusive factors to determine the relative reliability of hearsay statements, for purposes of Confrontation Clause analysis: (1) whether declarant, at time of making statement, had apparent motive to lie; (2) whether declarant's general character suggests trustworthiness; (3) whether more than one person heard the statement; (4) spontaneity of the statement; (5) whether trustworthiness is suggested from timing of statement and relationship between declarant and witness; (6) whether statement contains express

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assertions of past fact; (7) whether declarant's lack of knowledge could be established by cross-examination; (8) remoteness of possibility that declarant's recollection is faulty; and (9) whether surrounding circumstances suggest that declarant misrepresented defendant's involvement. U.S.C.A. Const.Amend. 6.

[8] Criminal Law ⇐419(2)
110k419(2)

Statements that defendant's wife made to police were not "hearsay," in prosecution for assault; they were not offered to prove the truth of the matters asserted, and instead were offered to demonstrate that defendant and his wife lied about the circumstances preceding the assault. ER 801(c).

[9] Criminal Law ⇐419(2)
110k419(2)

[9] Criminal Law ⇐662.8
110k662.8

Out-of-court statements raise hearsay and Confrontation Clause objections only when they are offered to prove the truth of the matter asserted. U.S.C.A. Const.Amend. 6; ER 801(c).

[10] Criminal Law ⇐419(1.5)
110k419(1.5)

[10] Criminal Law ⇐419(5)
110k419(5)

The second of two statements that defendant's wife made to police constituted "hearsay," in prosecution for assault; the wife was unavailable as witness because husband invoked the marital privilege, and the statements were offered to prove the truth of the matters asserted. West's RCWA 5.60.060(1); ER 801(c).

[11] Criminal Law ⇐662.8
110k662.8

A statement against penal interest is not considered a firmly-rooted exception to the hearsay rule, for purpose of Confrontation Clause analysis for admission of extrajudicial statements; thus, such a statement, if it inculpates the defendant, is admissible against defendant only when it bears adequate indicia of reliability. U.S.C.A. Const.Amend. 6; ER 804(b)(3).

[12] Criminal Law ⇐417(15)
110k417(15)

If self-exculpatory statements are included within a statement that is generally inculpatory to the declarant, only those portions that are actually self-inculpatory are admissible, under the hearsay exception for statements against penal interest. ER 804(b)(3).

[13] Criminal Law ⇐417(15)
110k417(15)

Hearsay statements of defendant's nontestifying wife to police, that defendant was "infuriated" and "past tipsy" when the assault occurred, that defendant said the victim "deserves a[n] ass whoopin'," and that victim may have reached into his pocket, possibly for a weapon, but was not holding a weapon when defendant stabbed him, were against wife's penal interest, as element for admission under hearsay exception for statements against penal interest, where wife had potential accomplice liability for the assault; wife had shown defendant where victim could be found, wife was present throughout the assault, wife did not turn to police when she had the opportunity, wife's statements did not shift blame to defendant, and wife's accomplice liability would be higher if defendant's criminal liability was higher. West's RCWA 9A.08.020(3)(a); ER 804(b)(3).

[14] Criminal Law ⇐662.10
110k662.10

A co-defendant's confession is presumed unreliable, for purposes of analyzing its admissibility under the Confrontation Clause. U.S.C.A. Const.Amend. 6.

[15] Criminal Law ⇐662.10
110k662.10

When a co-defendant's confession is virtually identical, i.e., interlocks, to the defendant's confession, it may be deemed reliable, for purposes of Confrontation Clause analysis regarding admissibility of the co-defendant's confession. U.S.C.A. Const.Amend. 6.

[16] Criminal Law ⇐662.8
110k662.8

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Statements that defendant and his wife gave to police were virtually identical and interlocking, so that wife's hearsay statements to police, which were otherwise admissible under a hearsay exception as statements against her penal interest, were sufficiently reliable, for purposes of Confrontation Clause analysis in prosecution for assault; defendant and his wife were equally unsure whether victim had been holding a weapon, and neither defendant nor his wife clearly stated that victim had a weapon in hand from which defendant was simply defending himself. U.S.C.A. Const.Amend. 6; ER 804(b)(3)

.

**657 *426 Edward Holm, Thurston County Prosecutor, Steven Sherman, Deputy, Olympia, for Petitioner.

Thomas Doyle, Hansville, Patricia Pethick, Tacoma, for Respondent.

**658 BRIDGE, J.

This case presents two issues: (1) whether a defendant waives an objection under the confrontation *427 clause to the admission of his wife's hearsay statements by exercising his marital privilege to prevent his spouse from testifying; and (2) whether the wife's statements are otherwise admissible as an exception to the hearsay rule or as an interlocking confession. We hold that a defendant does not waive his confrontation rights when he invokes the marital privilege. We also conclude that the statements here are admissible because the wife's statements interlock with those of her husband and hence provide adequate indicia of reliability to satisfy confrontation clause concerns.

## FACTS

On August 5, 1999, Michael Crawford stabbed Richard Rubin Kenneth Lee at Lee's apartment. *State v. Crawford*, noted at 107 Wash.App. 1025, 2001 WL 850119, at *1 (2001). Police arrested Crawford that evening and they collected two taped statements from both Crawford and his wife, Sylvia, who had been present at the time of the assault. Id. The first statements contained roughly the same account of the attack: the three had collected at Lee's house; Crawford left to buy alcohol; when he returned, Lee was making sexual advances toward Sylvia; Crawford stabbed Lee twice. Id.

Several hours after police taped the first statements, they again questioned the Crawfords independently regarding the events of August 5. Id. Their stories were again similar to each other, but distinctly different from the earlier version of the encounter. Id. This time the Crawfords each revealed that the alleged sexual assault had actually occurred several weeks earlier. Id. On the night in question, both Crawfords contended, Michael became angry when Lee was mentioned and he and his wife left to find Lee. Id. Sylvia directed her husband to Lee's apartment and after talking with him for a short period, Crawford stabbed Lee twice. Id. Although unclear, the main distinguishing factor in these second statements was that Crawford alluded that Lee *may* have had something in his hand *when* Crawford *428 stabbed Lee, while Sylvia implied that Lee *may* have grabbed for something *after* Crawford stabbed Lee. Id.

Crawford was charged with attempted first degree murder while armed with a deadly weapon and first degree assault while armed with a deadly weapon. Clerk's Papers (CP) at 2. At trial, Crawford claimed that he acted in self- defense and he invoked the marital privilege to prevent his wife from testifying against him. Report of Proceedings (RP) at 7-8. The trial court admitted both of Sylvia's statements on the grounds that the statements would not violate the marital privilege and because the court determined that the statements were sufficiently reliable to alleviate confrontation clause concerns. RP at 45, 53; RP at 219-21, Exs. 37, 38; RP at 231, Exs. 41-42. A jury subsequently convicted Crawford of first degree assault while armed with a deadly weapon. CP at 2. In an unpublished opinion, a divided Court of Appeals concluded that Crawford did not waive his right to confrontation when he invoked the marital privilege. *Crawford*, 2001 WL 850119, at *1. It then held that admitting Sylvia's second statement was reversible error because her statement did not possess adequate indicia of reliability, nor did it interlock with Michael's second statement. Id. at *5-7. Accordingly, the Court of Appeals reversed Crawford's conviction. Id. at *1. We granted review.

## WAIVER OF RIGHT TO CONFRONTATION

[1] Crawford invoked the marital privilege, RCW 5.60.060, to keep his wife from testifying against him at trial. RP at 7. The marital privilege in

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Washington states in relevant part:

> A husband shall not be examined for or against his wife, without the consent of the wife, nor a wife for or against her husband without the consent of the husband; nor can either during marriage or afterward, be without the consent of the other, examined as to any communication made by one to the other during marriage.

*429 RCW 5.60.060(1). Neither Crawford nor the State called Sylvia to testify. *See* RP at **659 7-14. Crawford claims, however, that his confrontation right under the Sixth Amendment, as applied to the states through the due process clause of the Fourteenth Amendment, was violated when Sylvia's hearsay statements to the police were admitted at trial.

The State contends that Crawford waived his right to confrontation when he neglected to call Sylvia at trial, relying on *State v. Salazar*, 59 Wash.App. 202, 796 P.2d 773 (1990) and *In re Personal Restraint of Sauve*, 103 Wash.2d 322, 692 P.2d 818 (1985), to support its position. While instructive, both *Salazar* and *Sauve* contain a key distinction from the case before us, making them distinguishable. In those cases the witness was "available"; Sylvia Crawford was not an available witness.

In *Salazar*, the defense counsel did not call an informant suggesting that defense was unable to locate him. 59 Wash.App. at 216, 796 P.2d 773. Rejecting the assertion that the witness was unavailable, the court stated, "We have held that a defendant who fails to call an available hearsay declarant waives an objection under the confrontation clause to admission of the hearsay." *Salazar*, 59 Wash.App. at 217, 796 P.2d 773 (citing *State v. Borland*, 57 Wash.App. 7, 12, 786 P.2d 810 (1990)). "Similarly, defense counsel's failure to call [the informant], who we assume was available absent persuasive evidence to the contrary, waived any confrontation clause objection." *Id.*

In *Sauve*, the defendant claimed that his confrontation right was violated when the police officer who received an informant's tip, failed to testify at the suppression hearing. 103 Wash.2d at 329, 692 P.2d 818. Although the court did not directly hold that Sauve had waived his confrontation right, it did note that the defendant's failure to exercise his rights at trial did not constitute a denial of such rights by the court. *Sauve*, 103 Wash.2d at 330, 692 P.2d 818 (citing *State v. Murphy*, 35 Wash.App. 658, 669 P.2d 891 (1983); *State v. Whittington*, 27 Wash.App. 422, 618 P.2d 121 (1980)). Accordingly, the court stated,

> There is no evidence that petitioner asked the State for the testimony of the officer who received the tip, nor did petitioner *430 himself attempt to call the officer to the stand. The State was not given a chance at trial to either present the officer's testimony or prove his unavailability. The failure of petitioner to exercise his rights at trial does not constitute a denial of such rights. *Id.*

In both *Salazar* and *Sauve* the witnesses were available, but the defense failed to call them at trial. In the case presented, in contrast, the witness, Sylvia Crawford, was unavailable to testify because Michael Crawford had invoked his marital privilege. The marital privilege explicitly states that "[a] husband shall not be examined for or against his wife, without the consent of the wife, nor a wife for or against her husband without the consent of the husband." RCW 5.60.060(1). This language specifically denies Sylvia the ability to testify either for or against her husband, rendering her unavailable as a witness. Although Michael, not Sylvia, invoked the privilege, the result is the same--Sylvia was unavailable to testify, unlike the witnesses in *Salazar* and *Sauve*. Therefore, the situation before us is distinct from *Salazar* and *Sauve* and it does not logically follow that Crawford waived his confrontation rights by not calling his wife to testify.

The conclusion that Crawford did not waive his confrontation rights is supported by a decision from this court that directly addressed the issue of marital privilege and extrajudicial statements by a third party. *See State v. Burden*, 120 Wash.2d 371, 374, 841 P.2d 758 (1992). In *Burden*, this court stated, "Here, the defendant asserts admission of Mary Burden's extrajudicial statements by third persons would indirectly violate the testimonial privilege and place [the defendant] in the position of having to waive the privilege to refute the testimony or allow the testimony without cross examination. We have previously rejected this argument." *Id.* (citing *State v. Kosanke*, 23 Wash.2d 211, 160 P.2d 541 (1945)). By recognizing the rejection of this argument, this court implied that the testimonial privilege is not violated by admissible hearsay

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statements*431 and, furthermore, that the defendant does not have **660 to waive the marital privilege to refute the testimony. Therefore, the defendant cannot be said to have waived his right to cross examination. [FN1]

FN1. Citing *Kosanke*, the *Burden* court further supported its position that the admission of the testimony neither indirectly violated the marital privilege nor forced the defendant to waive the privilege to refute the testimony.
"[T]he court [has not gone] so far as to hold that relevant and material evidence could not be adduced merely because, in order to refute the same, the wife of a defendant might have to be called as a witness. In this case the wife of appellant was not called as a witness by respondent, nor was the attention of the jury called to her in such a way as to require objection on the part of appellant in order to preserve his rights under the statute.... [T]he fact that refutation of competent evidence would require the wife being a witness does not make it erroneous to adduce the testimony. *The statute [testimonial privilege] was not violated either directly or indirectly.*"
*Burden*, 120 Wash.2d at 374, 841 P.2d 758 (quoting *Kosanke*, 23 Wash.2d at 217-18, 160 P.2d 541). According to this passage it is clear that the marital privilege still stands, as well as the right to confront the witness; neither has been waived.

[2][3] Further, courts are hesitant to accept waiver of a defendant's Sixth Amendment rights because of their significance in the trial process. *See generally* John R. Kroger, *The Confrontation Waiver Rule*, 76 B.U. L.REV. 835 (1996). " 'There are few subjects, perhaps, upon which [the Supreme Court] and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.' " *Id.* at 840 (quoting *Pointer v. Texas*, 380 U.S. 400, 405, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965)). Where a waiver has been recognized, the waiver usually occurs when the defendant has inappropriately caused the witness's unavailability. *Id.* at 844. Thus, " 'a defendant may waive the right to confront witnesses against him when his own misconduct is responsible for a witness's unavailability at trial.' " *Id.* at 842 (quoting *United States v. Potamitis*, 739 F.2d 784, 788 (2d Cir.1984)). Misconduct is not apparent when a defendant invokes a statutory privilege, however. *See United States v. Barlow*, 693 F.2d 954, 962 (6th Cir.1982) (suggesting that only sham marriage would result in waiver, but admitting legitimate spouse's grand jury testimony when it met *432 adequate guarantees of trustworthiness). In the case before us Crawford invoked a recognized statutory privilege. [FN2]

FN2. Although no formula has emerged for application of the confrontation waiver rule, case law suggests six major legal issues that courts will resolve before applying the doctrine: "(1) witness unavailability, (2) cause of unavailability, (3) intent, (4) standard of proof, (5) statement reliability, and (6) waiver hearing procedure." Kroger, *supra*, at 846. The key element for this case is the cause of the unavailability. "Two paradigmatic ways in which a defendant satisfies the causation requirement have evolved: murder and threats." *Id.* at 849. From this statement it is apparent that the evolution of the waiver doctrine has not been directed at the legitimate invocation of statutory privileges, absent threat or other indication of malfeasance.

As the Court of Appeals acknowledged here, forcing the defendant to choose between the marital privilege and confronting his spouse presents an untenable Hobson's choice. *Crawford*, 2001 WL 850119, at *1. The Court of Appeals aptly noted that this court traditionally has "not required a defendant to waive one right to preserve another." *Id.* (citing *State v. Michielli*, 132 Wash.2d 229, 246, 937 P.2d 587 (1997) (upholding dismissal of case where defendant was forced to choose between waiving right to speedy trial or right to effective assistance of counsel); *State v. Price*, 94 Wash.2d 810, 814, 620 P.2d 994 (1980) (stating that forcing defendant to choose between effective assistance of counsel and speedy trial impermissibly prejudices defendant)). Both *Michielli* and *Price* present situations where a defendant was forced to balance his trial rights and ultimately select one right to the exclusion of the other. To force a defendant to choose the more difficult position of confronting his spouse on the stand, or to assume that he has waived his confrontation right by electing not to call his wife, presents a similarly untenable choice and undermines the marital privilege itself. Therefore, we hold that Crawford did not waive his right to confrontation when he invoked the marital privilege.

**661 ADMISSIBILITY OF HEARSAY

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If Crawford did not waive his right to confrontation, the State contends in the alternative that Sylvia's out-of-court *433 statements to the police were admissible hearsay that did not violate the Sixth Amendment.

This court has noted a distinction between in-court testimony and extrajudicial statements by a spouse. In drawing a distinction between the two, we have concluded that hearsay statements may be admissible under certain circumstances. *Burden*, 120 Wash.2d at 377, 841 P.2d 758. Forcing a spouse to testify, however, challenges the policy purposes behind the privilege. In *Burden*, this court determined that the policy purposes--fostering domestic harmony and preventing discord, reflecting the natural repugnance of having one spouse testify against the other, and preventing the testifying spouse from having to choose between perjury, contempt of court, or jeopardizing the marriage--supported this distinction. *Id.* at 375, 841 P.2d 758 (citing *State v. Thorne*, 43 Wash.2d 47, 55, 260 P.2d 331 (1953); *State v. Wood*, 52 Wash.App. 159, 163, 758 P.2d 530 (1988); Teresa Virginia Bigelow, Comment, *The Marital Privileges in Washington Law: Spouse Testimony and Marital Communications*, 54 WASH. L.REV. 65, 70 (1978-79)). We concluded that the latter two purposes would not be affected by allowing third person testimony, because the spouse would not be testifying in court, and questioned the applicability of the first purpose. *Burden*, 120 Wash.2d at 375-76, 841 P.2d 758. Thus, as we have acknowledged, confronting a spouse on the stand is quite distinct from admitting an extrajudicial statement.

[4] To assess whether an extrajudicial hearsay statement is admissible we apply a multilayered analysis, in consideration of the valuable constitutional protections afforded by the Sixth Amendment. Simply because a statement falls within a hearsay exception does not mean that it will satisfy the Sixth Amendment. *State v. Rice*, 120 Wash.2d 549, 565, 844 P.2d 416 (1993). Therefore, the court will employ specific safeguards " 'to ensure that the proffered evidence offers some reliability in terms of the declarant's perception, memory and credibility--a function traditionally performed by cross examination.' " *Id.* at 566, 844 P.2d 416 (quoting *State v. Anderson*, 107 Wash.2d 745, 750-51, 733 P.2d 517 (1987)).

[5][6][7] *434 First, the statements must be admissible under the rules of evidence. *Rice*, 120 Wash.2d at 564, 844 P.2d 416. Second, the statements must contain a sufficient indicia of reliability and trustworthiness to satisfy the requirements of the confrontation clause. *Id.* A firmly rooted exception to the hearsay rule will satisfy this requirement. *State v. Davis*, 141 Wash.2d 798, 845, 10 P.3d 977 (2000). If the exception is not firmly rooted, then the court will consider nine nonexclusive factors to determine the relative reliability of the hearsay statements. [FN3] *Rice*, 120 Wash.2d at 565-66, 844 P.2d 416; *State v. Whelchel*, 115 Wash.2d 708, 722-25, 801 P.2d 948 (1990). Alternatively, the indicia of reliability test can be met if the statements "interlock" in accordance with our decision in *Rice*. 120 Wash.2d at 569-70, 844 P.2d 416.

FN3. The nine factors include: (1) whether the declarant, at the time of making the statement, had an apparent motive to lie; (2) whether the declarant's general character suggests trustworthiness; (3) whether more than one person heard the statement; (4) the spontaneity of the statement; (5) whether trustworthiness is suggested from the timing of the statement and the relationship between the declarant and the witness; (6) whether the statement contains express assertions of past fact; (7) whether the declarant's lack of knowledge could be established by cross-examination; (8) the remoteness of the possibility that the declarant's recollection is faulty; and (9) whether the surrounding circumstances suggest that the declarant misrepresented the defendant's involvement.

[8][9] Sylvia's first statement to the police is not hearsay because it was not offered to prove the truth of the matter asserted. [FN4] ER 801(c). Instead, as the Court of Appeals noted, it was offered to demonstrate that the Crawfords lied about the circumstances preceding the assault. *Crawford*, 2001 WL **662 850119, at *5. Considering that out-of-court statements raise hearsay and confrontation clause objections only when they are offered to prove the truth of the matter asserted, Sylvia's first statement is not inherently objectionable. *State v. Parris*, 98 Wash.2d 140, 145, 654 P.2d 77 (1982). It will be admissible, however, only if it is relevant under ER 401, and it is relevant only if her second statement is admitted.

FN4. The defense counsel did not object to the admission of the statements as hearsay when they

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were presented at trial. *See* RP at 219- 32. Defense argument appears to hinge on the previous invocation of the marital privilege and right to confrontation. *See* RP at 7-21, 37.

[10][11] *435 Sylvia's second statement is hearsay: The declarant is unavailable at trial--because Crawford invoked the marital privilege--and the statement is being offered to prove the truth of the matter asserted. ER 801(c). The State contends that Sylvia's second statement is admissible under ER 804(b)(3), the hearsay exception for a declarant's statement against penal interest. A statement against penal interest is not considered a firmly rooted exception to the hearsay rule, however. *Whelchel*, 115 Wash.2d at 715, 801 P.2d 948. Therefore, "out-of-court statements from a nontestifying codefendant made against penal interests and which inculpate the defendant are admissible against the defendant only when they bear adequate indicia of reliability." *State v. St. Pierre*, 111 Wash.2d 105, 113, 759 P.2d 383 (1988) (citing *Anderson*, 107 Wash.2d at 750, 733 P.2d 517; *State v. Dictado*, 102 Wash.2d 277, 287-88, 687 P.2d 172 (1984)). Thus, we must determine whether the statement contains a sufficient indicia of reliability to satisfy the confrontation clause. *See Ohio v. Roberts*, 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980).

[12] Before we determine whether the statement is sufficiently reliable to satisfy confrontation clause concerns, we must assess which portions of the statement were actually against Sylvia's penal interest. Only the portions of Sylvia's statement that are self-inculpatory will be admitted under the statement against interest exception to the hearsay rule. *See State v. Roberts*, 142 Wash.2d 471, 491-97, 14 P.3d 713 (2000); ER 804(b)(3). In *Roberts* this court adopted the Supreme Court's rejection of a "whole statement" approach to defendant declarations. 142 Wash.2d at 494, 14 P.3d 713 (adopting *Williamson v. United States*, 512 U.S. 594, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994)). Therefore, even though self-exculpatory statements may be included within a statement that is generally inculpatory, only those portions that are actually self-inculpatory are admissible. *Id.* at 492-94, 14 P.3d 713.

A statement against interest, or self-inculpatory statement, is defined as:

*436 A statement which was *at the time of its making* so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true.
ER 804(b)(3) (emphasis added).

[13] Crawford objected to the admission of Sylvia's statements that he was " 'infuriated,' " " 'past tipsy,' " and that he said Lee " 'deserves a ass whoopin.' " *Crawford*, 2001 WL 850119, at *7 n. 3 (Armstrong, C.J., dissenting). He also objected to the admission of Sylvia's statement regarding whether Lee reached for or possessed a weapon when Michael assaulted him because it allegedly rebutted his own testimony and damaged his self-defense claim.

While potentially damaging to Michael, these statements are all inculpatory of Sylvia as well. It was Sylvia who showed Michael where to find Lee and she was present through the duration of the violent encounter. She walked away from the stabbing with Michael and did not turn to the police when she had the opportunity. As a potential accomplice, [FN5] therefore, Sylvia would benefit from limiting Michael's involvement; the lesser his charge, the lesser her accomplice liability. Sylvia's statements that Michael was "infuriated," "past tipsy," and that he **663 said Lee "deserves a ass whoopin" would not shift blame from her to Michael, but rather it could increase Michael's culpability, and potentially hers as well. Furthermore, if Sylvia knew that Michael wanted to give Lee an "ass whoopin" and took Michael to find Lee, this fact could support a charge against Sylvia for accomplice liability because she could be viewed as encouraging or aiding the facilitation of a crime. *See* RCW 9A.08.020(3)(a). Likewise, Sylvia's assertion that Lee *437 may have reached into his pocket, possibly for a weapon, but had empty hands when Michael stabbed him, would be against her interest. Rather, she would benefit her own case if she had said that Lee wielded a weapon throughout the confrontation and that Michael was merely protecting himself. Therefore, we conclude that these statements were self-inculpatory and admissible hearsay, provided they meet a sufficient indicia of reliability.

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FN5. An accomplice is someone who with knowledge that it will promote or facilitate the commission of a crime either (1) solicits, commands, encourages, or requests such other person to commit the crime or (2) aids or agrees to aid the other person in planning or committing the crime. RCW 9A.08.020(3)(a).

[14][15] Because a codefendant's confession is presumed unreliable, [FN6] the statement must either meet a firmly rooted exception to the hearsay rule [FN7] or provide some indicia of reliability, such as interlocking with the defendant's own confession. *St. Pierre*, 111 Wash.2d at 112-13, 759 P.2d 383. The State asserts that Sylvia's second statement is admissible as an interlocking confession with Michael's second statement. *See generally Rice*, 120 Wash.2d 549, 844 P.2d 416 (adopting *Lee v. Illinois*, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986)). As this court recognized in *Rice*, "[w]hen a codefendant's confession is virtually identical [i.e., interlocks] to that of a defendant, it may be deemed reliable." *Id.* at 570, 844 P.2d 416 (citing *Lee*, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514). Hence an interlocking confession will serve the same purpose as the nine-factor test in assessing reliability. *Id.*

FN6. Although Sylvia is not a codefendant, as she has not been formally charged with a crime, her role is similar to that of a codefendant. She was present during the assault, was arrested and gave a statement to the police concerning the events, and had an arguable motive to shift the blame away from herself. Her role in this case thus suggests applying the *Rice* interlocking confession analysis by analogy.

FN7. As previously noted, a statement against penal interest is not a firmly rooted hearsay exception for purposes of the confrontation clause.

[16] The Court of Appeals here held that, although the Crawfords' statements were "very similar," they differed regarding whether Lee was armed when Michael stabbed him. *Crawford*, 2001 WL 850119, at *6. Following are the two statements for comparison.

Sylvia's statement:
Q: did Kenny do anything to fight back from this assault
*438 A: (pausing) I know he reached into his pocket ... or somethin' ... I don't know what
Q: after he was stabbed
A: he saw Michael coming up. He lifted his hand ... his chest open, he might of went to go strike his hand out or something and then (inaudible)
Q: okay, you, you gotta speak up
A: okay, he lifted his hand over his head maybe to strike Michael's hand down or something and then he put his hands in his ... put his right hand in his right pocket ... took a step back ... Michael proceeded to stab him ... then his hands were like ... how do you explain this ... open arms ... with his hands open and he fell down ... and we ran (describing subject holding hands open, palms toward assailant)
Q: okay, when he's standing there with his open hands you're talking about Kenny, correct
A: yeah, after, after the fact, yes
Q: did you see anything in his hands at that point
A: (pausing) um um (no)
Ex. 42, at 6-7.

Michael's statement:
Q: okay. Did you ever see anything in [Lee's] hands
A: I think so, but I'm not positive
Q: okay, when you think so, what do you mean by that
A: I coulda swore I seen him goin' for somethin' before, right before everything **664 happened. He was like reachin', fiddlin' around down here and stuff ... and I just ... I don't know, I think, this is just a possibility, but I think, I think that he pulled somethin' out and I grabbed for it and that's how I got cut ... but I'm not positive. I, I my mind goes blank when things like this happen. I mean, I just, I remember things wrong, I remember things that just doesn't, don't make sense to me later.
Ex. 44, at 7.

Although the Court of Appeals concluded that the statements were contradictory, upon closer inspection they appear *439 to overlap. The Court of Appeals stated that Sylvia's version of the story had Lee grabbing for something only after he had been stabbed, while Michael stated that Lee may have had something in his hand before the attack. *Crawford*, 2001 WL 850119, at *6. However, when asked whether Lee fought back from the assault, Sylvia states that Lee "lifted his hand over his head maybe to strike Michael's hand down or something and then he put his hands in his ... put his right

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hand in his right pocket ... took a step back ... Michael proceeded to stab him...." Ex. 42, at 7. She also previously stated that she was unsure how Michael received the cut on his hand. *Id.* at 6. Thus, it is unclear from Sylvia's statement when, if ever, Lee possessed a weapon.

Michael's statement is equally ambiguous. He states, "I coulda swore I seen him goin' for somethin' before, right before everything happened. He was like reachin', fiddlin' around down here and stuff ... and I just ... I don't know, I think, this is just a possibility, but I think, I think that he pulled somethin' out and I grabbed for it and that's how I got cut ... but I'm not positive." Ex. 44, at 7. Thus, both of the Crawfords' statements indicate that Lee was possibly grabbing for a weapon, but they are equally unsure when this event may have taken place. They are also equally unsure how Michael received the cut on his hand, leading the court to question when, if ever, Lee possessed a weapon. In this respect they overlap.

Self-defense is at issue in this case, so admittedly the timing of Lee's possession of a weapon is significant. However, both of the Crawfords' statements are ambiguous as to whether Lee ever actually possessed a weapon. The interlocking confession rule is designed to admit "virtually identical" statements. *Rice*, 120 Wash.2d at 570, 844 P.2d 416. As the dissent from the Court of Appeals noted, and we agree, "neither Michael nor Sylvia clearly stated that Lee had a weapon in hand from which Michael was simply defending himself. And it is this omission by both that interlocks the statements and makes Sylvia's statement reliable." *Crawford*, *440 *2001 WL 850119, at * 7 (Armstrong, C.J., dissenting). Because Sylvia's and Michael's statements are virtually identical, admission of Sylvia's statement satisfies the requirement of reliability under the confrontation clause.*

CONCLUSION

We hold that a defendant does not waive his Sixth Amendment right to confront an adverse witness when he invokes the marital privilege to keep his wife from testifying at trial. Thus, Michael Crawford did not waive his confrontation clause rights when he invoked RCW 5.60.060 and refused to call his wife, Sylvia, to testify at his trial. Sylvia's pretrial statements to the police, at issue in this case, were admissible, however, because they were self- inculpatory and they interlocked with Michaels' own admissible statements.

We reverse the Court of Appeals and reinstate the conviction.

ALEXANDER, C.J., SMITH, JOHNSON, MADSEN, SANDERS, IRELAND, CHAMBERS and OWENS, JJ., concur.

54 P.3d 656, 147 Wash.2d 424

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B 5 Response Requested

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES
NO. 02-9410

STATE OF WASHINGTON,
Respondent,
vs.
MICHAEL D. CRAWFORD,
Appellant.

CERTIFICATE OF MAILING

STATE OF WASHINGTON )
) ss.
COUNTY OF THURSTON )

I, Carol E. Jones, hereby state under penalty of perjury, that I am over the age of 18 years and competent to be a witness in the above-entitled cause, that on the 8th day of May, 2003, I caused to be mailed to the Appellant's Attorney of record, BRUCE E.H. JOHNSON, a copy of STATE'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI, by depositing same in the United States mail at Olympia, Washington, addressed as follows:

BRUCE E.H. JOHNSON
Attorney at Law
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688

I hereby swear under penalty of perjury under the laws of the State of Washington, that the above is true and correct.

Signed this 5th day of May, 2003, at Olympia, Washington.

Carol E. Jones
Prosecutorial Assistant

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053 Response Requested

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Supreme Court, U.S.
FILED
MAY 12 2003
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No. 02-9410

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

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MICHAEL D. CRAWFORD,

*Petitioner,*

v.

STATE OF WASHINGTON,

*Respondent.*

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On Petition for a Writ of Certiorari
to the Supreme Court of Washington

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# REPLY BRIEF FOR PETITIONER

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ORIGINAL

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## REPLY BRIEF FOR PETITIONER

The State's Brief in Opposition does not offer any persuasive reason to deny review of the important Confrontation Clause issues that this case presents. These issues continue to divide courts and to frustrate the proper administration of justice throughout the country, and they should be resolved at once.

### A. This Court Should Resolve the Split of Authority Over Whether the Confrontation Clause Permits the Admission of an Accomplice's Custodial Statement on the Ground that it "Interlocks" with the Defendant's Confession.

None of the three arguments that the State advances for denying review of the "interlocking confession" question presented withstands scrutiny.

1. The State acknowledges that federal and state courts are divided over the question whether the Confrontation Clause permits the admission of an accomplice's custodial statement on the ground that it "interlocks" with the defendant's confession. The State contends, however, that this issue does not arise frequently enough to warrant review, suggesting that only eight state high courts and two federal courts of appeals over the past seventeen years have considered the issue. Br. in Opp. at 4. But this assertion understates both the number of courts that actually have considered the issue and the frequency with which it arises in general.

As an initial matter, the Petition for Certiorari cites cases from *twelve* federal and state courts over the *thirteen* years since this Court's decision in *Wright v. Idaho*, 497 U.S. 805 (1990), not from ten courts over the past seventeen years. The State ignores decisions on the "interlocking confession" question presented that the Petition cites from two jurisdictions – Louisiana and the Eastern District of Michigan, *see* Pet. for Cert. at 9 – which also demonstrate that this issue arises with regularity. The State also overlooks the fact that there are several federal and state courts that confronted and resolved the interlocking confession issue arose in the few years before *Wright*. *See, e.g., United States v. Smith*, 792 F.2d 441, 444 (4th Cir. 1986) (condoning admission of nontestifying

accomplice's statement incriminating defendant because it "interlocked" with defendant's prior statement); *United States v. Koistinen*, 27 M.J. 279, 282-83 (C.M.A. 1988) (same); *State v. St. Pierre*, 111 Wn.2d 105, 112-13, 759 P.2d 383 (Wash. 1988) (same); *People v. Brensic*, 506 N.Y.S.2d 570, 588-89 (N.Y. App. Div. 1986) (same), *rev'd*, 70 N.E.2d 1226 (N.Y. 1987) (on state law grounds).

What is more, the "interlocking confession" question presented arises more often than even all of these cases indicate. Further research reveals that at least one other state supreme court recently has confronted the issue. In *Grabow v. Commonwealth*, 34 S.W.3d 63, 79 (Ky. 2000), the Kentucky Supreme Court upheld the admission of an accomplice confession in part because "although the interlocking nature of the defendants' respective confessions is not determinative of admissibility, it is a factor to be considered in determining whether the codefendant's confession has sufficient indicia of reliability." *Id.* at 79. The court, echoing the Washington Supreme Court, concluded that "the discussion in *Wright* appears to pertain to corroborating physical evidence as opposed to the defendant's own confession." *Id.* at 79 n.13. Other federal district courts also have addressed this issue. *Compare Galvin v. Kelly*, 79 F. Supp.2d 265, 271, 275-76 (W.D.N.Y. 2000) (rejecting Confrontation Clause claim in part because nontestifying accomplice's confession was "corroborated by" petitioner's prior custodial statement to police officer) *and Simmons v. Whitley*, 1991 WL 129813, at *2-3 (E.D. La. 1991) (stating that "[w]here an accomplice's statement 'interlocks' with the confession of a criminal defendant . . . the confession may be admissible" and upholding admission of accomplice statement on this basis) *with Anderson v. Cowan*, 61 F. Supp.2d 770, 776 (N.D. Ill. 1999) (admission of confession by codefendant, who was tried before a separate jury, violated Confrontation Clause "even if the . . . statement interlocks with the defendant's own confession"), *aff'd on other grounds*, 227 F.3d 893 (7th Cir. 2000). Accounting for these cases in the calculation of the conflict at issue here, as well as the *Smith* and *Koistinen* decisions cited in the preceding paragraph, deepens the split of



authority to nine-to-seven – including two state supreme courts, one federal court of appeals, and the U.S. military's highest court on one side, and four state courts of last resort on the other side.

Finally, the slightly broader issue implicated by the interlocking confession question presented – whether the Confrontation Clause's anti-corroboration rule is limited to physical evidence – also has arisen with regularity (and with conflicting results) in pre- and post-*Wright* cases. *Compare* Pet. for Cert. at 9-10 (citing two federal appellate decisions holding that anti-corroboration rule extends to trial testimony) *with United States v. Gio*, 7 F.3d 1279, 1288-89 (7th Cir. 1993) (allowing admission of accomplice's statements incriminating defendant because they were corroborated by other testimony at trial); *State v. Gilliam*, 635 N.E.2d 1242, 1246 (Ohio 1994) (same), *overruled in part on other grounds by State v. Madrigal*, 721 N.E.2d 52, 56 (Ohio 2000); *State v. Earnest*, 744 P.2d 539, 540 (N.M. 1987) (same).

Even all of the foregoing citations, of course, vastly underrepresent the importance of the interlocking confession question presented and the need for this Court to clarify the scope of *Wright*'s anti-corroboration rule. This issue often arises in trials that do not ultimately generate an appellate decision on the issue. *See, e.g., State v. LaBounty*, 716 A.2d 1, 6 (Vt. 1998) (trial court admitted statement based on "interlock" theory; supreme court suggested that this was erroneous but affirmed on other reliability grounds); *Wright v. State*, 440 S.E.2d 7, 9 (Ga. 1994) (noting that trial court admitted "interlocking" statement of accomplice but resolving case on harmless error grounds instead of deciding Confrontation Clause issue). Indeed, most states do not publish *any* of their trial courts' decisions, and many pretrial orders in federal district courts are never published, so in untold numbers of prosecutions there is no reported record of the issue's presence or effect on the case. But it is worth noting that once courts such as Washington's rule that interlocking confessions are admissible, prosecutors in those jurisdictions appear to invoke this reliability loophole frequently. *See State v. Grabner*,

2001 WL 783759, at *4 (Wash. App. 2001) (upholding admission of accomplice confession because it "interlocked"); *State v. Williams*, 1999 WL 639461, at *5-6 (Wash. App. 1999) (same); *State v. Holt*, 1997 WL 117073, at *9 (Wash. App. 1997) (same); *cf. United States v. Wallace*, 27 F.3d 564 (table), 1994 WL 276769, at *1 (4th Cir. 1994) (noting that the government sought to try two accomplices in separate trials "due to a problem with interlocking confessions" – that "problem" presumably being that such confessions are inadmissible in joint trials under *Cruz v. New York*, 481 U.S. 186 (1987), but were held admissible in separate trials in *United States v. Smith*, 792 F.2d 441, 444 (4th Cir. 1986)). The case at issue here is yet another one following this pattern.

In short, it requires minimal research or reflection to realize that police officers frequently arrest multiple suspected accomplices for various crimes and that those alleged accomplices frequently give similar statements while in custody. The issue whether those statements are admissible against persons other than their declarants, therefore, affects the administration of criminal justice – from prosecutors and defense attorneys' preliminary strategies to trials themselves – throughout the country.

2. The State's contention that the Washington Supreme Court's decision allowing the admission of accomplices' interlocking confessions is consistent with this Court's precedent – and particularly with *Lee v. Illinois*, 476 U.S. 530 (1986) – is incorrect. This Court has never upheld the admission of an accomplice's custodial confession that incriminated a criminal defendant on an "interlocking" or any other basis. In *Lee*, this Court held that the Confrontation Clause *prohibited* the admission of the statement at issue. Thus, contrary to the State's suggestion (Br. in Opp. at 3, 5), the *Wright* decision did not need to "overrule" *Lee* in order to put to rest that decision's suggestion that the Confrontation Clause might permit the admission of an interlocking confession.

In any event, whatever the merits of the State's and the Washington Supreme Court's view that *Wright*'s anti-corroboration rule is limited to physical evidence and that interlocking confessions are admissible, four state courts of last resort, two federal courts



of appeals, and three other courts have reached the opposite conclusions. *See* Pet. for Cert. at 8-10. This Court is the only institution that can resolve this conflict over the meaning of the Confrontation Clause and its precedents.

3. Finally, there is no merit to State's argument that the accomplice's statement here would have been admissible irrespective of its interlocking nature because the circumstances surrounding it evince particularized guarantees of trustworthiness sufficient to dispense with adversarial testing.[1] The Washington Court of Appeals rejected this exact argument, holding that a "nine-factor test fails to demonstrate that Sylvia's statement to the police was sufficiently reliable to satisfy the . . . confrontation clause." Pet. App. 13a-14a. In reaching this decision, the court of appeals noted that at the time of her statement Sylvia was in police custody for her potential involvement in a crime; that her statement described past events; that she had a motive to lie in order to shift some blame away from herself; that she apparently had lied to the police several hours earlier about the events at issue; and that she may have lacked personal knowledge on the crucial issue of whether Petitioner acted in self-defense because she "stated that she shut her eyes during the stabbing." App. 13a. The Washington Supreme Court did not take issue with the court of appeals' holding on this point, and neither of the non-interlocking-related circumstances the State points to in its Brief in Opposition even begins to overcome the "presumptive unreliability that attaches to accomplices' confessions that shift or spread blame . . . when the government is involved in the statements' production, and when the statements describe past events." *Lilly v. Virginia*, 527 U.S. 116, 137 (1999) (plurality opinion) (holding that custodial statement by

[1] Although the State terms this a "harmless error" argument (Br. in Opp. at 6), it does not dispute the Washington Court of Appeals' conclusion that if the admission of Sylvia's statement violated the Confrontation Clause, this error had a prejudicial effect on the jury verdict and requires reversal. *See* Pet. for Cert. at 12-13; Pet. App. 15a. Rather, the State's argument here is that even if the evidence of "interlock" cannot support the admission of Sylvia's statement, the statement's admission still did not violate the Confrontation Clause.

defendant's relative, his brother, was unreliable). Consequently, the question whether the Confrontation Clause permitted the admission of Sylvia's custodial statement on the ground that it "interlocked" with Petitioner's is squarely presented here.

### B. This Court Should Reexamine the *Ohio v. Roberts* Framework and Hold that the Confrontation Clause Renders Out-of-Court "Testimonial" Statements, Such as Accomplices' Custodial Confessions, Per Se Inadmissible Against Criminal Defendants.

As the Petition for Certiorari explained, the split of authority at issue here is merely emblematic of the confusion – and, indeed, the subversion of basic principles of adversarial justice – that continues to flow from the framework that this Court established in *Ohio v. Roberts,* 448 U.S. 56 (1980). The State, in fact, does not dispute that the choice between the *Roberts* framework and the "testimonial" approach described in the Petition presents an issue of substantial importance because courts across the Nation commonly admit accomplice confessions and other out-of-court statements against criminal defendants that would be per se inadmissible under the testimonial approach. *See* Pet. for Cert. at 17-20.

Another example of such a decision from just a few months ago exemplifies the significance of this issue. In *Wrighter v. State,* 2003 WL 318527 (Tex. App. Feb. 13, 2003), the police arrested and questioned two men whom they accused of committing a murder. One of the men admitted being present at the shooting but asserted that he had acted "in self-defense." He also stated that the defendant had participated in the crime. But this accomplice did not testify at the defendant's trial. Instead, the prosecution offered and the court admitted a tape recording of his custodial statement incriminating the defendant. This procedure constituted a "paradigmatic" violation of the defendant's confrontation right under the testimonial approach. *Lilly,* 527 U.S. at 143 (Scalia, J., concurring in part and concurring in the judgment); *accord White v. Illinois,* 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in judgment). Yet the Texas Court of Appeals upheld the statement's admission under Texas hearsay law as a



statement "against penal interest" and then, effectively as a direct consequence, under the *Roberts* Confrontation Clause framework. *Wrighter,* 2003 WL at *3-6. The court reached this conclusion even though the accomplice in his statement expressly refused to take criminal responsibility for his actions and even though the four-Justice plurality in *Lilly* expressly held that the Confrontation Clause does not permit the admission of out-of-court statements that "spread" criminal blame simply because they are technically against penal interest. *Lilly,* 527 U.S. at 133-34.

This decision and the others cited in the Petition for Certiorari illustrate the manipulability and inconsistency of the *Roberts* framework, as well as the confusion over whether the *Lilly* plurality opinion applying that framework is even binding law. *See* Pet for Cert. at 19 n.2. They also show that courts will persist condoning trials that violate the text and the core purpose of the Confrontation Clause unless and until this Court adopts the testimonial approach – an approach that properly construes the Clause as bright-line principle of criminal procedure instead of a nebulous afterthought to state hearsay law. *Cf. Lilly,* 527 U.S. at 140-41 (Breyer, J., concurring) (doubting that Framers intended Confrontation Clause to be tied "so directly to the hearsay rule"). Accordingly, this Court should heed the recent calls of this Court's Justices, leading scholars, and the United States Solicitor General to reexamine the *Roberts* framework and to consider embracing the testimonial approach to the Confrontation Clause. *See* Pet. for Cert. at 14-16.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 12, 2003



NO. 02-9410

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

MICHAEL D. CRAWFORD,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

---

On Petition for a Writ of Certiorari
to the Supreme Court of Washington

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## CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2003, I served counsel of record with a true and correct copy of the following documents:

1. Reply Brief for Petitioner; and

2. Certificate of Service

by causing the same to be delivered via Federal Express to:

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May 12, 2003

**VIA FEDERAL EXPRESS**

United States Supreme Court
**Attn: Clerk of the Court**
1 First Street NE
Washington D.C. 20543

Re: *Michael D. Crawford v. State of Washington*, No. 02-9410

Dear Clerk of the Court:

Enclosed please find an original plus 11 copies of a Reply Brief for Petitioner and Certificate of Service for filing. Please return a conformed copy in the envelope provided.

Thank you for your attention to this request. Please call if you have any questions.

Very truly yours,

Davis Wright Tremaine LLP

Jeffrey L. Fisher

Enclosures

Supreme Court, U.S.
FILED
JUL 24 2003
OFFICE OF THE CLERK

No. 02-9410

# In The Supreme Court of the United States

MICHAEL D. CRAWFORD,

*Petitioner,*

v.

WASHINGTON,

*Respondent.*

**On Writ Of Certiorari To The Supreme Court Of Washington**

## JOINT APPENDIX

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**Petition For Certiorari Filed March 10, 2003**
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| 10/18/99-10/22/99 | Thurston County, WA Superior Court | Petitioner's Trial |
| 10/22/99 | Thurston County, WA Superior Court | Petitioner Found (1) Not Guilty of Attempted First Degree Murder with a Deadly Weapon and (2) Guilty of First Degree Assault with a Deadly Weapon |
| 11/19/99 | Thurston County, WA Superior Court | Petitioner Sentenced to 174 Months in Prison |
| 11/19/99 | WA Court of Appeals, Division II | Notice of Appeal Filed by Petitioner |
| 02/21/01 | WA Court of Appeals, Division II | Oral Argument Heard |
| 07/30/01 | WA Court of Appeals, Division II | Opinion Issued, Petitioner's Conviction and Sentence Reversed |
| 10/02/01 | WA Supreme Court | Petition For Review Filed by Respondent |
| 03/05/02 | WA Supreme Court | Petition for Review Granted |
| 5/23/02 | WA Supreme Court | Oral Argument Heard |
| 9/26/02 | WA Supreme Court | Opinion Issued, Petitioner's Conviction and Sentence Reinstated |
| 10/16/02 | WA Supreme Court | Motion for Reconsideration Filed by Petitioner |
| 12/12/02 | WA Supreme Court | Motion for Reconsideration Denied |

54 P.3d 656

Supreme Court of Washington,
En Banc.

STATE of Washington, Petitioner,
v.
Michael **D. CRAWFORD**, Respondent.

No. 71683-8.

Argued March 5, 2002.
Decided Sept. 26, 2002.

**BRIDGE, J.**

This case presents two issues: (1) whether a defendant waives an objection under the confrontation clause to the admission of his wife's hearsay statements by exercising his marital privilege to prevent his spouse from testifying; and (2) whether the wife's statements are otherwise admissible as an exception to the hearsay rule or as an interlocking confession. We hold that a defendant does not waive his confrontation rights when he invokes the marital privilege. We also conclude that the statements here are admissible because the wife's statements interlock with those of her husband and hence provide adequate indicia of reliability to satisfy confrontation clause concerns.

## FACTS

On August 5, 1999, Michael Crawford stabbed Richard Rubin Kenneth Lee at Lee's apartment. *State v. Crawford*, noted at 107 Wash.App. 1025, 2001 WL 850119, at *1 (2001). Police arrested Crawford that evening and they collected two taped statements from both Crawford and his wife, Sylvia, who had been present at the time of the



assault. Id. The first statements contained roughly the same account of the attack: the three had collected at Lee's house; Crawford left to buy alcohol; when he returned, Lee was making sexual advances toward Sylvia; Crawford stabbed Lee twice. Id.

Several hours after police taped the first statements, they again questioned the Crawfords independently regarding the events of August 5. Id. Their stories were again similar to each other, but distinctly different from the earlier version of the encounter. Id. This time the Crawfords each revealed that the alleged sexual assault had actually occurred several weeks earlier. Id. On the night in question, both Crawfords contended, Michael became angry when Lee was mentioned and he and his wife left to find Lee. Id. Sylvia directed her husband to Lee's apartment and after talking with him for a short period, Crawford stabbed Lee twice. Id. Although unclear, the main distinguishing factor in these second statements was that Crawford alluded that Lee *may* have had something in his hand *when* Crawford stabbed Lee, while Sylvia implied that Lee *may* have grabbed for something *after* Crawford stabbed Lee. Id.

Crawford was charged with attempted first degree murder while armed with a deadly weapon and first degree assault while armed with a deadly weapon. Clerk's Papers (CP) at 2. At trial, Crawford claimed that he acted in self-defense and he invoked the marital privilege to prevent his wife from testifying against him. Report of Proceedings (RP) at 7-8. The trial court admitted both of Sylvia's statements on the grounds that the statements would not violate the marital privilege and because the court determined that the statements were sufficiently reliable to alleviate confrontation clause concerns. RP at

45, 53; RP at 219-21, Exs. 37, 38; RP at 231, Exs. 41-42. A jury subsequently convicted Crawford of first degree assault while armed with a deadly weapon. CP at 2. In an unpublished opinion, a divided Court of Appeals concluded that Crawford did not waive his right to confrontation when he invoked the marital privilege. *Crawford,* 2001 WL 850119, at *1. It then held that admitting Sylvia's second statement was reversible error because her statement did not possess adequate indicia of reliability, nor did it interlock with Michael's second statement. Id. at *5-7. Accordingly, the Court of Appeals reversed Crawford's conviction. Id. at *1. We granted review.

## WAIVER OF RIGHT TO CONFRONTATION

Crawford invoked the marital privilege, RCW 5.60.060, to keep his wife from testifying against him at trial. RP at 7. The marital privilege in Washington states in relevant part:

> A husband shall not be examined for or against his wife, without the consent of the wife, nor a wife for or against her husband without the consent of the husband; nor can either during marriage or afterward, be without the consent of the other, examined as to any communication made by one to the other during marriage.

RCW 5.60.060(1). Neither Crawford nor the State called Sylvia to testify. *See* RP at 7-14. Crawford claims, however, that his confrontation right under the Sixth Amendment, as applied to the states through the due process clause of the Fourteenth Amendment, was violated when Sylvia's hearsay statements to the police were admitted at trial.



The State contends that Crawford waived his right to confrontation when he neglected to call Sylvia at trial, relying on *State v. Salazar,* 59 Wash.App. 202, 796 P.2d 773 (1990) and *In re Personal Restraint of Sauve,* 103 Wash.2d 322, 692 P.2d 818 (1985), to support its position. While instructive, both *Salazar* and *Sauve* contain a key distinction from the case before us, making them distinguishable. In those cases the witness was "available"; Sylvia Crawford was not an available witness.

In *Salazar,* the defense counsel did not call an informant suggesting that defense was unable to locate him. 59 Wash.App. at 216, 796 P.2d 773. Rejecting the assertion that the witness was unavailable, the court stated, "We have held that a defendant who fails to call an available hearsay declarant waives an objection under the confrontation clause to admission of the hearsay." *Salazar,* 59 Wash.App. at 217, 796 P.2d 773 (citing *State v. Borland,* 57 Wash.App. 7, 12, 786 P.2d 810 (1990)). "Similarly, defense counsel's failure to call [the informant], who we assume was available absent persuasive evidence to the contrary, waived any confrontation clause objection." *Id.*

In *Sauve,* the defendant claimed that his confrontation right was violated when the police officer who received an informant's tip, failed to testify at the suppression hearing. 103 Wash.2d at 329, 692 P.2d 818. Although the court did not directly hold that Sauve had waived his confrontation right, it did note that the defendant's failure to exercise his rights at trial did not constitute a denial of such rights by the court. *Sauve,* 103 Wash.2d at 330, 692 P.2d 818 (citing *State v. Murphy,* 35 Wash.App. 658, 669 P.2d 891 (1983); *State v. Whittington,* 27 Wash.App. 422, 618 P.2d 121 (1980)). Accordingly, the court stated,

> There is no evidence that petitioner asked the State for the testimony of the officer who received the tip, nor did petitioner himself attempt to call the officer to the stand. The State was not given a chance at trial to either present the officer's testimony or prove his unavailability. The failure of petitioner to exercise his rights at trial does not constitute a denial of such rights.

*Id.*

In both *Salazar* and *Sauve* the witnesses were available, but the defense failed to call them at trial. In the case presented, in contrast, the witness, Sylvia Crawford, was unavailable to testify because Michael Crawford had invoked his marital privilege. The marital privilege explicitly states that "[a] husband shall not be examined for or against his wife, without the consent of the wife, nor a wife for or against her husband without the consent of the husband." RCW 5.60.060(1). This language specifically denies Sylvia the ability to testify either for or against her husband, rendering her unavailable as a witness. Although Michael, not Sylvia, invoked the privilege, the result is the same – Sylvia was unavailable to testify, unlike the witnesses in *Salazar* and *Sauve*. Therefore, the situation before us is distinct from *Salazar* and *Sauve* and it does not logically follow that Crawford waived his confrontation rights by not calling his wife to testify.

The conclusion that Crawford did not waive his confrontation rights is supported by a decision from this court that directly addressed the issue of marital privilege and extrajudicial statements by a third party. *See State v. Burden*, 120 Wash.2d 371, 374, 841 P.2d 758 (1992). In *Burden*, this court stated, "Here, the defendant asserts admission of Mary Burden's extrajudicial statements by



third persons would indirectly violate the testimonial privilege and place [the defendant] in the position of having to waive the privilege to refute the testimony or allow the testimony without cross examination. We have previously rejected this argument." *Id.* (citing *State v. Kosanke*, 23 Wash.2d 211, 160 P.2d 541 (1945)). By recognizing the rejection of this argument, this court implied that the testimonial privilege is not violated by admissible hearsay statements and, furthermore, that the defendant does not have to waive the marital privilege to refute the testimony. Therefore, the defendant cannot be said to have waived his right to cross examination.[1]

Further, courts are hesitant to accept waiver of a defendant's Sixth Amendment rights because of their significance in the trial process. *See generally* John R. Kroger, *The Confrontation Waiver Rule*, 76 B.U. L.REV.

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[1] Citing *Kosanke*, the *Burden* court further supported its position that the admission of the testimony neither indirectly violated the marital privilege nor forced the defendant to waive the privilege to refute the testimony.

> "[T]he court [has not gone] so far as to hold that relevant and material evidence could not be adduced merely because, in order to refute the same, the wife of a defendant might have to be called as a witness. In this case the wife of appellant was not called as a witness by respondent, nor was the attention of the jury called to her in such a way as to require objection on the part of appellant in order to preserve his rights under the statute. . . . [T]he fact that refutation of competent evidence would require the wife being a witness does not make it erroneous to adduce the testimony. *The statute [testimonial privilege] was not violated either directly or indirectly.*"

*Burden*, 120 Wash.2d at 374, 841 P.2d 758 (quoting *Kosanke*, 23 Wash.2d at 217-18, 160 P.2d 541). According to this passage it is clear that the marital privilege still stands, as well as the right to confront the witness; neither has been waived.

835 (1996). "'There are few subjects, perhaps, upon which [the Supreme Court] and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.'" *Id.* at 840 (quoting *Pointer v. Texas,* 380 U.S. 400, 405, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965)). Where a waiver has been recognized, the waiver usually occurs when the defendant has inappropriately caused the witness's unavailability. *Id.* at 844. Thus, "'a defendant may waive the right to confront witnesses against him when his own misconduct is responsible for a witness's unavailability at trial.'" *Id.* at 842 (quoting *United States v. Potamitis,* 739 F.2d 784, 788 (2d Cir.1984)). Misconduct is not apparent when a defendant invokes a statutory privilege, however. *See United States v. Barlow,* 693 F.2d 954, 962 (6th Cir.1982) (suggesting that only sham marriage would result in waiver, but admitting legitimate spouse's grand jury testimony when it met adequate guarantees of trustworthiness). In the case before us Crawford invoked a recognized statutory privilege.[2]

[2] Although no formula has emerged for application of the confrontation waiver rule, case law suggests six major legal issues that courts will resolve before applying the doctrine: "(1) witness unavailability, (2) cause of unavailability, (3) intent, (4) standard of proof, (5) statement reliability, and (6) waiver hearing procedure." Kroger, *supra,* at 846. The key element for this case is the cause of the unavailability. "Two paradigmatic ways in which a defendant satisfies the causation requirement have evolved: murder and threats." *Id.* at 849. From this statement it is apparent that the evolution of the waiver doctrine has not been directed at the legitimate invocation of statutory privileges, absent threat or other indication of malfeasance.



As the Court of Appeals acknowledged here, forcing the defendant to choose between the marital privilege and confronting his spouse presents an untenable Hobson's choice. *Crawford,* 2001 WL 850119, at *1. The Court of Appeals aptly noted that this court traditionally has "not required a defendant to waive one right to preserve another." *Id.* (citing *State v. Michielli,* 132 Wash.2d 229, 246, 937 P.2d 587 (1997) (upholding dismissal of case where defendant was forced to choose between waiving right to speedy trial or right to effective assistance of counsel); *State v. Price,* 94 Wash.2d 810, 814, 620 P.2d 994 (1980) (stating that forcing defendant to choose between effective assistance of counsel and speedy trial impermissibly prejudices defendant)). Both *Michielli* and *Price* present situations where a defendant was forced to balance his trial rights and ultimately select one right to the exclusion of the other. To force a defendant to choose the more difficult position of confronting his spouse on the stand, or to assume that he has waived his confrontation right by electing not to call his wife, presents a similarly untenable choice and undermines the marital privilege itself. Therefore, we hold that Crawford did not waive his right to confrontation when he invoked the marital privilege.

## ADMISSIBILITY OF HEARSAY

If Crawford did not waive his right to confrontation, the State contends in the alternative that Sylvia's out-of-court statements to the police were admissible hearsay that did not violate the Sixth Amendment.

This court has noted a distinction between in-court testimony and extrajudicial statements by a spouse. In drawing a distinction between the two, we have concluded

that hearsay statements may be admissible under certain circumstances. *Burden,* 120 Wash.2d at 377, 841 P.2d 758. Forcing a spouse to testify, however, challenges the policy purposes behind the privilege. In *Burden,* this court determined that the policy purposes – fostering domestic harmony and preventing discord, reflecting the natural repugnance of having one spouse testify against the other, and preventing the testifying spouse from having to choose between perjury, contempt of court, or jeopardizing the marriage – supported this distinction. *Id.* at 375, 841 P.2d 758 (citing *State v. Thorne,* 43 Wash.2d 47, 55, 260 P.2d 331 (1953); *State v. Wood,* 52 Wash.App. 159, 163, 758 P.2d 530 (1988); Teresa Virginia Bigelow, Comment, *The Marital Privileges in Washington Law: Spouse Testimony and Marital Communications,* 54 WASH. L.REV. 65, 70 (1978-79)). We concluded that the latter two purposes would not be affected by allowing third person testimony, because the spouse would not be testifying in court, and questioned the applicability of the first purpose. *Burden,* 120 Wash.2d at 375-76, 841 P.2d 758. Thus, as we have acknowledged, confronting a spouse on the stand is quite distinct from admitting an extrajudicial statement.

To assess whether an extrajudicial hearsay statement is admissible we apply a multilayered analysis, in consideration of the valuable constitutional protections afforded by the Sixth Amendment. Simply because a statement falls within a hearsay exception does not mean that it will satisfy the Sixth Amendment. *State v. Rice,* 120 Wash.2d 549, 565, 844 P.2d 416 (1993). Therefore, the court will employ specific safeguards "'to ensure that the proffered evidence offers some reliability in terms of the declarant's perception, memory and credibility – a function traditionally performed by cross examination.'" *Id.* at 566, 844 P.2d



416 (quoting *State v. Anderson,* 107 Wash.2d 745, 750-51, 733 P.2d 517 (1987)).

First, the statements must be admissible under the rules of evidence. *Rice,* 120 Wash.2d at 564, 844 P.2d 416. Second, the statements must contain a sufficient indicia of reliability and trustworthiness to satisfy the requirements of the confrontation clause. *Id.* A firmly rooted exception to the hearsay rule will satisfy this requirement. *State v. Davis,* 141 Wash.2d 798, 845, 10 P.3d 977 (2000). If the exception is not firmly rooted, then the court will consider nine nonexclusive factors to determine the relative reliability of the hearsay statements.[3] *Rice,* 120 Wash.2d at 565-66, 844 P.2d 416; *State v. Whelchel,* 115 Wash.2d 708, 722-25, 801 P.2d 948 (1990). Alternatively, the indicia of reliability test can be met if the statements "interlock" in accordance with our decision in *Rice.* 120 Wash.2d at 569-70, 844 P.2d 416.

Sylvia's first statement to the police is not hearsay because it was not offered to prove the truth of the matter

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[3] The nine factors include: (1) whether the declarant, at the time of making the statement, had an apparent motive to lie; (2) whether the declarant's general character suggests trustworthiness; (3) whether more than one person heard the statement; (4) the spontaneity of the statement; (5) whether trustworthiness is suggested from the timing of the statement and the relationship between the declarant and the witness; (6) whether the statement contains express assertions of past fact; (7) whether the declarant's lack of knowledge could be established by cross-examination; (8) the remoteness of the possibility that the declarant's recollection is faulty; and (9) whether the surrounding circumstances suggest that the declarant misrepresented the defendant's involvement.

asserted.[4] ER 801(c). Instead, as the Court of Appeals noted, it was offered to demonstrate that the Crawfords lied about the circumstances preceding the assault. *Crawford,* 2001 WL 850119, at *5. Considering that out-of-court statements raise hearsay and confrontation clause objections only when they are offered to prove the truth of the matter asserted, Sylvia's first statement is not inherently objectionable. *State v. Parris,* 98 Wash.2d 140, 145, 654 P.2d 77 (1982). It will be admissible, however, only if it is relevant under ER 401, and it is relevant only if her second statement is admitted.

Sylvia's second statement is hearsay: The declarant is unavailable at trial – because Crawford invoked the marital privilege – and the statement is being offered to prove the truth of the matter asserted. ER 801(c). The State contends that Sylvia's second statement is admissible under ER 804(b)(3), the hearsay exception for a declarant's statement against penal interest. A statement against penal interest is not considered a firmly rooted exception to the hearsay rule, however. *Whelchel,* 115 Wash.2d at 715, 801 P.2d 948. Therefore, "out-of-court statements from a nontestifying codefendant made against penal interests and which inculpate the defendant are admissible against the defendant only when they bear adequate indicia of reliability." *State v. St. Pierre,* 111 Wash.2d 105, 113, 759 P.2d 383 (1988) (citing *Anderson,* 107 Wash.2d at 750, 733 P.2d 517; *State v. Dictado,* 102

[4] The defense counsel did not object to the admission of the statements as hearsay when they were presented at trial. *See* RP at 219-32. Defense argument appears to hinge on the previous invocation of the marital privilege and right to confrontation. *See* RP at 7-21, 37.



Wash.2d 277, 287-88, 687 P.2d 172 (1984)). Thus, we must determine whether the statement contains a sufficient indicia of reliability to satisfy the confrontation clause. *See Ohio v. Roberts,* 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980).

Before we determine whether the statement is sufficiently reliable to satisfy confrontation clause concerns, we must assess which portions of the statement were actually against Sylvia's penal interest. Only the portions of Sylvia's statement that are self-inculpatory will be admitted under the statement against interest exception to the hearsay rule. *See State v. Roberts,* 142 Wash.2d 471, 491-97, 14 P.3d 713 (2000); ER 804(b)(3). In *Roberts* this court adopted the Supreme Court's rejection of a "whole statement" approach to defendant declarations. 142 Wash.2d at 494, 14 P.3d 713 (adopting *Williamson v. United States,* 512 U.S. 594, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994)). Therefore, even though self-exculpatory statements may be included within a statement that is generally inculpatory, only those portions that are actually self-inculpatory are admissible. *Id.* at 492-94, 14 P.3d 713.

A statement against interest, or self-inculpatory statement, is defined as:

> A statement which was *at the time of its making* so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true.
>
> ER 804(b)(3) (emphasis added).

Crawford objected to the admission of Sylvia's statements that he was "'infuriated,'" "'past tipsy,'" and that he said Lee "'deserves a ass whoopin.'" *Crawford,* 2001 WL 850119, at *7 n. 3 (Armstrong, C.J., dissenting). He also objected to the admission of Sylvia's statement regarding whether Lee reached for or possessed a weapon when Michael assaulted him because it allegedly rebutted his own testimony and damaged his self-defense claim.

While potentially damaging to Michael, these statements are all inculpatory of Sylvia as well. It was Sylvia who showed Michael where to find Lee and she was present through the duration of the violent encounter. She walked away from the stabbing with Michael and did not turn to the police when she had the opportunity. As a potential accomplice,[5] therefore, Sylvia would benefit from limiting Michael's involvement; the lesser his charge, the lesser her accomplice liability. Sylvia's statements that Michael was "infuriated," "past tipsy," and that he said Lee "deserves a ass whoopin" would not shift blame from her to Michael, but rather it could increase Michael's culpability, and potentially hers as well. Furthermore, if Sylvia knew that Michael wanted to give Lee an "ass whoopin" and took Michael to find Lee, this fact could support a charge against Sylvia for accomplice liability because she could be viewed as encouraging or aiding the facilitation of a crime. *See* RCW 9A.08.020(3)(a). Likewise, Sylvia's

[5] An accomplice is someone who with knowledge that it will promote or facilitate the commission of a crime either (1) solicits, commands, encourages, or requests such other person to commit the crime or (2) aids or agrees to aid the other person in planning or committing the crime. RCW 9A.08.020(3)(a).



assertion that Lee may have reached into his pocket, possibly for a weapon, but had empty hands when Michael stabbed him, would be against her interest. Rather, she would benefit her own case if she had said that Lee wielded a weapon throughout the confrontation and that Michael was merely protecting himself. Therefore, we conclude that these statements were self-inculpatory and admissible hearsay, provided they meet a sufficient indicia of reliability.

Because a codefendant's confession is presumed unreliable,[6] the statement must either meet a firmly rooted exception to the hearsay rule[7] or provide some indicia of reliability, such as interlocking with the defendant's own confession. *St. Pierre,* 111 Wash.2d at 112-13, 759 P.2d 383. The State asserts that Sylvia's second statement is admissible as an interlocking confession with Michael's second statement. *See generally Rice,* 120 Wash.2d 549, 844 P.2d 416 (adopting *Lee v. Illinois,* 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986)). As this court recognized in *Rice,* "[w]hen a codefendant's confession is virtually identical [i.e., interlocks] to that of a defendant, it may be deemed reliable." *Id.* at 570, 844 P.2d 416 (citing *Lee,* 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d

[6] Although Sylvia is not a codefendant, as she has not been formally charged with a crime, her role is similar to that of a codefendant. She was present during the assault, was arrested and gave a statement to the police concerning the events, and had an arguable motive to shift the blame away from herself. Her role in this case thus suggests applying the *Rice* interlocking confession analysis by analogy.

[7] As previously noted, a statement against penal interest is not a firmly rooted hearsay exception for purposes of the confrontation clause.

514). Hence an interlocking confession will serve the same purpose as the nine-factor test in assessing reliability. *Id.*

The Court of Appeals here held that, although the Crawfords' statements were "very similar," they differed regarding whether Lee was armed when Michael stabbed him. *Crawford,* 2001 WL 850119, at *6. Following are the two statements for comparison.

Sylvia's statement:

Q: did Kenny do anything to fight back from this assault

A: (pausing) I know he reached into his pocket . . . or somethin' . . . I don't know what

Q: after he was stabbed

A: he saw Michael coming up. He lifted his hand . . . his chest open, he might of went to go strike his hand out or something and then (inaudible)

Q: okay, you, you gotta speak up

A: okay, he lifted his hand over his head maybe to strike Michael's hand down or something and then he put his hands in his . . . put his right hand in his right pocket . . . took a step back . . . Michael proceeded to stab him . . . then his hands were like . . . how do you explain this . . . open arms . . . with his hands open and he fell down . . . and we ran (describing subject holding hands open, palms toward assailant)

Q: okay, when he's standing there with his open hands you're talking about Kenny, correct

A: yeah, after, after the fact, yes



Q: did you see anything in his hands at that point

A: (pausing) um um (no)

Ex. 42, at 6-7.

Michael's statement:

Q: okay. Did you ever see anything in [Lee's] hands

A: I think so, but I'm not positive

Q: okay, when you think so, what do you mean by that

A: I coulda swore I seen him goin' for somethin' before, right before everything happened. He was like reachin', fiddlin' around down here and stuff . . . and I just . . . I don't know, I think, this is just a possibility, but I think, I think that he pulled somethin' out and I grabbed for it and that's how I got cut . . . but I'm not positive. I, I my mind goes blank when things like this happen. I mean, I just, I remember things wrong, I remember things that just doesn't, don't make sense to me later.

Ex. 44, at 7.

Although the Court of Appeals concluded that the statements were contradictory, upon closer inspection they appear to overlap. The Court of Appeals stated that Sylvia's version of the story had Lee grabbing for something only after he had been stabbed, while Michael stated that Lee may have had something in his hand before the attack. *Crawford,* 2001 WL 850119, at *6. However, when asked whether Lee fought back from the assault, Sylvia states that Lee "lifted his hand over his head maybe to

strike Michael's hand down or something and then he put his hands in his . . . put his right hand in his right pocket . . . took a step back . . . Michael proceeded to stab him. . . ." Ex. 42, at 7. She also previously stated that she was unsure how Michael received the cut on his hand. *Id.* at 6. Thus, it is unclear from Sylvia's statement when, if ever, Lee possessed a weapon.

Michael's statement is equally ambiguous. He states, "I coulda swore I seen him goin' for somethin' before, right before everything happened. He was like reachin', fiddlin' around down here and stuff . . . and I just . . . I don't know, I think, this is just a possibility, but I think, I think that he pulled somethin' out and I grabbed for it and that's how I got cut . . . but I'm not positive." Ex. 44, at 7. Thus, both of the Crawfords' statements indicate that Lee was possibly grabbing for a weapon, but they are equally unsure when this event may have taken place. They are also equally unsure how Michael received the cut on his hand, leading the court to question when, if ever, Lee possessed a weapon. In this respect they overlap.

Self-defense is at issue in this case, so admittedly the timing of Lee's possession of a weapon is significant. However, both of the Crawfords' statements are ambiguous as to whether Lee ever actually possessed a weapon. The interlocking confession rule is designed to admit "virtually identical" statements. *Rice,* 120 Wash.2d at 570, 844 P.2d 416. As the dissent from the Court of Appeals noted, and we agree, "neither Michael nor Sylvia clearly stated that Lee had a weapon in hand from which Michael was simply defending himself. And it is this omission by both that interlocks the statements and makes Sylvia's statement reliable." *Crawford*, 2001 WL 850119, at *7 (Armstrong, C.J., dissenting). *Because Sylvia's and*



*Michael's statements are virtually identical, admission of Sylvia's statement satisfies the requirement of reliability under the confrontation clause.*

## CONCLUSION

We hold that a defendant does not waive his Sixth Amendment right to confront an adverse witness when he invokes the marital privilege to keep his wife from testifying at trial. Thus, Michael Crawford did not waive his confrontation clause rights when he invoked RCW 5.60.060 and refused to call his wife, Sylvia, to testify at his trial. Sylvia's pretrial statements to the police, at issue in this case, were admissible, however, because they were self-inculpatory and they interlocked with Michaels' own admissible statements.

We reverse the Court of Appeals and reinstate the conviction.

ALEXANDER, C.J., SMITH, JOHNSON, MADSEN, SANDERS, IRELAND, CHAMBERS and OWENS, JJ., concur.

107 Wash.App. 1025

Court of Appeals of Washington, Division 2.

STATE of Washington, Respondent,
v.
Michael CRAWFORD, Appellant.

No. 25307-1-II.

July 30, 2001.

Appeal from Superior Court of Thurston County, Docket No. 99-1-01205-8, judgment or order under review, date filed 11/19/1999; Richard A. Strophy, Judge.

UNPUBLISHED OPINION

BRIDGEWATER, J.

Michael Crawford appeals his conviction of first degree assault while armed with a deadly weapon. We reverse.

FACTS

On August 5, 1999, defendant Michael D. Crawford stabbed Rubin Richard Kenneth Lee at Lee's home. Police apprehended Michael that evening and he gave two taped statements. His wife, Sylvia Crawford, was with him during the stabbing; she also gave police two taped statements.

The Crawfords' first taped statements contained roughly similar stories. The Crawfords stated that they knew Lee and that they went to visit him at his apartment the day of the stabbing. Michael left briefly to go to a nearby store. Lee then made sexual advances toward Sylvia, which she fought off. Michael returned and heard



his wife yelling. Michael and Lee started to fight and Lee was stabbed. The Crawfords quickly left.

The police separately questioned the Crawfords a second time several hours later. Again their statements were roughly similar, but the stories changed from the first version. They each stated that the alleged sexual assault by Lee against Sylvia had actually occurred several weeks earlier.

On the day of the stabbing, the Crawfords were visiting with friends when someone mentioned Lee. Michael became angry and he and Sylvia went to find Lee. They went to several bars looking for Lee before going to his apartment. They knocked at the wrong apartment, but Lee opened his door. The three talked for a short time and then Michael stabbed Lee. The difference in the second statements is that in Michael's second statement he says that Lee may have had something in his hand when he stabbed Lee, but in Sylvia's second statement, she says that Lee may have grabbed for something later, after Michael stabbed him.

The trial judge admitted both of Sylvia's statements after Michael invoked the marital privilege to prevent her from testifying.

The jury convicted Michael of first degree assault while armed with a deadly weapon.

ANALYSIS

I. Waiver of the Confrontation Right

The State, citing *State v. Salazar,* 59 Wn.App. 202, 217, 796 P.2d 773 (1990), argues that Michael waived his

right to confrontation by not allowing Sylvia to testify. The marital privilege statute, RCW 5.60.060(1), states that a wife shall not be examined for or against her husband without her husband's consent. The State argues that Michael could have allowed Sylvia to testify, and by not doing so, he waived his right to confrontation. We disagree.

The *Salazar* Court held that a defendant who fails to call an available hearsay declarant waives a confrontation clause objection to the hearsay statement. We question this result. But even if we accept *Salazar*'s reasoning, the issue here is different. In *Salazar*, the defendant had no right to prevent the witness from testifying. Here, Michael had a statutory right to keep his wife from testifying against him. And the State cites no authority to support the notion that a defendant waives his or her constitutional right to confront an adverse witness by invoking another right to keep the witness from testifying. Moreover, the argument runs counter to the rationale of *State v. Burden,* 120 Wn.2d 371, 378, 841 P.2d 758 (1992), where the court held that marital privilege does not bar third-person testimony of the defendant's wife's hearsay statements, but the statements "must still meet other requirements for admissibility." If a defendant waives a confrontation clause challenge by invoking the marital privilege, there would be no other requirements to meet. Furthermore, in other settings, we have not required a defendant to waive one right to preserve another. *See State v. Michielli,* 132 Wn.2d 229, 246, 937 P.2d 587 (1997) (upholding dismissal of a case where defendant was forced to choose between waiving the right to a speedy trial or the right to effective assistance of counsel); *State v. Price,* 94 Wn.2d 810, 814, 620 P.2d 994 (1980) (stating that



forcing defendant to choose between effective assistance of counsel and speedy trial impermissibly prejudices defendant). Forcing Michael to relinquish the marital privilege to preserve his right to confrontation would render the marital privilege meaningless. We decline to do so.

## II. Admissibility of Sylvia's Out-of-Court Statements

### A. Standard of Review

We use a three-step analysis to review the trial court's decision to admit Sylvia's statements. "First, we must determine whether the statements are admissible under our Rules of Evidence. Second, we consider whether additional indicia of reliability satisfy the requirements of the confrontation clause. Finally, even if a statement fails to meet these requirements, we consider whether or not the error was harmless." *State v. Rice,* 120 Wn.2d 549, 564, 844 P.2d 416 (1993).

### B. Admissibility of Sylvia's Statements

Michael argues that Sylvia's out-of-court statements to the police were inadmissible under the confrontation clause of the Sixth Amendment and ER 804(b)(3). The confrontation clause gives a defendant the right to "be confronted with the witnesses against him." U.S. Const. amend. 6. Hearsay evidence does not offend the confrontation clause if the hearsay statement bears "adequate indicia of reliability." *Ohio v. Roberts,* 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). A statement bears adequate indicia of reliability if it (1) falls within a firmly rooted hearsay exception or (2) contains "particularized guarantees of trustworthiness." *Roberts,* 448 U.S. at 66. ER 804(b)(3) – the hearsay exception for statements

against the declarant's penal interest – is not considered a firmly rooted hearsay exception. *State v. Whelchel,* 115 Wn.2d 708, 715, 801 P.2d 948 (1990).

But evidence that satisfies the third prong of ER 804(b)(3) also satisfies the confrontation clause requirement of "indicia of reliability." ER 804(b)(3) allows the court to admit a hearsay statement against penal interest if (1) the declarant is unavailable at trial; (2) the statement tends to subject the declarant to criminal liability such that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true; and (3) corroborating circumstances clearly indicate the trustworthiness of the statement. ER 804(b)(3). The corroboration requirement under ER 804(b)(3) "arguably mirrors" the trustworthiness requirement under the confrontation clause. *Whelchel,* 115 Wn.2d at 716. Thus, a corroborated inculpatory statement that is admissible under ER 804(b)(3) satisfies the confrontation clause as well. *Whelchel,* 115 Wn.2d at 716-17.

1. The First Statement

Sylvia made two statements to the police. The State correctly points out that Sylvia's first statement is not hearsay because it was not used to prove the truth of the matter asserted. Rather, it was used to show that the Crawfords initially lied about the circumstances that led up to the stabbing. Confrontation and hearsay problems arise only when the out-of-court statement is offered to prove the truth of the matter asserted. *State v. Parris,* 98 Wn.2d 140, 145, 654 P.2d 77 (1982). Thus, Sylvia's first statement is not objectionable under the confrontation clause or ER 804(b)(3). However, it is admissible only if it



is relevant under ER 401, and it is relevant only if the second statement is admitted, because the second statement impeaches the first by its supposed truthfulness. Thus, if the second statement is not admitted, then the first statement is not relevant and not admissible.

2. The Second Statement

Because Sylvia's second statement is hearsay, the ER 804(b)(3) analysis is necessary. The rule's first requirement – that the declarant be unavailable – is met. ER 804(a) defines "unavailability" to include a witness who is exempt from testifying because of privilege. Here, the parties agreed that Sylvia was unavailable to testify pursuant to the marital privilege statute, RCW 5.60.010(a).

The second requirement of ER 804(b)(3) is that the declarant's statement be against his or her penal interest. Washington courts have analyzed this requirement in the context of accomplices' or co-defendants' hearsay statements. *See, e.g., Whelchel,* 115 Wn.2d 708; *State v. St. Pierre,* 111 Wn.2d 105, 117-18, 759 P.2d 383 (1988). The question is whether the overall circumstances surrounding the statement tend to make it self-serving or disserving. *Whelchel,* 115 Wn.2d at 721. Relevant factors may include a declarant's motive to curry favor with the authorities; whether the declarant gave the statement spontaneously and freely or under potentially coercive conditions; whether the declarant sought to avoid culpability, sought revenge against the defendant, or was afraid of the defendant; and whether the declarant sought a plea bargain. *Whelchel,* 115 Wn.2d at 717-22.

The trial court concluded that Sylvia's second statement, as a whole, was against her penal interest. Although

it was Michael's idea to go find Lee, Sylvia admitted that she agreed to accompany him. She admitted that she showed Michael where Lee lived so that Michael could confront him. She also admitted that she thought the stabbing was 'justified' and did not call the police afterward. These admissions could give rise to accomplice liability for Sylvia. There is no indication that Sylvia was coerced – the detective read Sylvia her Miranda[1] rights, and she waived them. There is also no suggestion of plea-bargaining. Instead of trying to foist blame onto Michael, Sylvia hedged about how Lee was stabbed and whose knife was used to stab him. She also backtracked about how angry Michael was when he found out about Lee's sexual advances. Finally, she defended Michael to the police, saying, "[H]e's one of the most fair people you'll ever meet" and that he was her "best friend." Ex. 42 at 8. Considering this evidence, the trial court concluded that Sylvia's apparent motive in talking to the police was to help Michael.

We hold that the trial court was correct that parts of Sylvia's statement were against her penal interest. But parts of her statement were not against her penal interest. Sylvia described Michael as "infuriated," "enraged," and "past tipsy," and she stated that Michael said Lee "deserves a ass whoopin'." Ex. 42 at 4. These statements, argues Michael, tend to exculpate Sylvia while incriminating him. We agree.

[1] *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).



The U.S. Supreme Court considered the same argument in *Williamson v. U.S.,* 512 U.S. 594, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994). The District Court had ruled below that an accomplice's confession was admissible against the defendant under Fed.R.Evid. 804(b)(3). *Williamson,* 512 U.S. at 597. Parts of the confession were self-inculpatory, but other parts were not. *Williamson,* 512 U.S. at 604. After analyzing the text and the principle behind Rule 804(b)(3), the Supreme Court held that it was improper to admit the entire confession. *Williamson,* 512 U.S. at 604. The Court remanded the case for a determination of which parts of the confession were truly self-inculpatory. *Williamson,* 512 U.S. at 604. Our Supreme Court followed *Williamson* in *State v. Roberts,* 142 Wn.2d 471, 499, 14 P.3d 713 (2000), where it held that parts of the non-testifying co-defendant's confession were both against his interest and reliable. Thus, the Roberts court sent the case back to redact the non-testifying co-defendant's statement to allow in evidence only those portions that were against his interest and reliable.

Similarly, parts of Sylvia's statement were not against her penal interest. Thus, the statement-against-penal-interest exception does not apply to these parts, and they are inadmissible unless some other hearsay exception applies. The State argues that these self-exculpatory parts are admissible under ER 803(a)(3), the state-of-mind exception. This exception allows into evidence hearsay statements of "the declarant's then existing state of mind, emotion, sensation or physical condition." But this exception is not applicable here. The declarant is Sylvia; when she said that Michael was "infuriated," "enraged," and "past tipsy," she was describing Michael's state of mind, not her own. Even if the exception applied to Michael's

declaration that Lee "deserves a ass whoopin'," there remains an additional level of hearsay (Sylvia's repeating that statement) that would exclude it. Hearsay within hearsay is inadmissible unless a hearsay exception applies to each statement. ER 805. Thus, because no hearsay exception applies to the self-exculpatory parts of Sylvia's statement, it was error to admit them.

Now we turn to whether Sylvia's redacted statements, i.e., those that were against her penal interest, were reliable. Washington courts use a nine-part test to determine whether an out-of-court statement satisfies the reliability prong of ER 804(b)(3) and the confrontation clause. This nine-part test examines factors that show particularized guaranties of the statement's trustworthiness. *Whelchel,* 115 Wn.2d at 722-25. Not all of the factors need to be present for the statement to be admissible. *State v. Anderson,* 107 Wn.2d 745, 753, 733 P.2d 517 (1987).

The first guideline is whether the declarant had an apparent motive to lie. As noted above, Sylvia's apparent motive was to help Michael. In fact, she admitted that her first statement was in part a lie. And although her statement did not resemble the unequivocal blame-shifting apparent in many accomplice confessions, it also does not show a motive to be truthful.

The second guideline is whether the declarant's general character suggests trustworthiness. Sylvia gave the police two versions of her statement within four hours of each other. This does not suggest trustworthiness.

As in *Whelchel,* the third guideline – whether more than one person heard the statement – is irrelevant here



since the police taped Sylvia's statement. *See Whelchel,* 115 Wn.2d at 722.

The fourth guideline is whether the declarant made the statement spontaneously. The *Whelchel* court found that a voluntary and spontaneous statement suggested more trustworthiness than specific answers to specific questions. *Whelchel,* 115 Wn.2d at 723. Here Sylvia made her statement during police questioning, so the format necessarily consisted of answers to specific questions. Parts of her statement consisted of narrative, but they were not "spontaneous" or "voluntary" in the sense that she offered unsolicited information to the police. She was responding to questions such as "[W]hat happened between you and Kenny the first time[?]" Ex. 42 at 3, or "How did you end up back over there today?" Ex. 42 at 4. But when answering questions that would incriminate Michael, Sylvia was evasive, hedging, or hesitant to respond. Overall, Sylvia's statements do not show the spontaneity that suggests reliability.

The fifth guideline is whether the timing of the statements and the relationship between the declarant and the witness suggests trustworthiness. Statements to friends may be more trustworthy than statements to police. *Whelchel,* 115 Wn.2d at 723. Although one court found reliable a statement made to police immediately after the event in question, the court also noted that the declarant made the statement "without any attempt to fabricate a response." *State v. Rivas,* 49 Wn.App. 677, 688, 746 P.2d 312 (1987). Since Sylvia had already fabricated one response to police and was evasive in parts of her statement, this factor also suggests untrustworthiness.

Guideline six is whether Sylvia's statement contained express assertions of past fact. Her statement is mostly express assertions of past fact. Thus, it did not carry on its face a warning against giving it undue weight. *Whelchel,* 115 Wn.2d at 724. This weighs against admitting the statement.

The seventh guideline is whether cross-examination could help to show the declarant's lack of knowledge. This factor tends to support a finding of trustworthiness. There is no dispute that Sylvia was present before, during, and after the stabbing. But Sylvia stated that she shut her eyes during the stabbing. Cross-examination could show that she did not see Lee attack Michael because of this. We conclude that cross-examination could reveal that she lacked knowledge of what happened.

Guideline eight is the possibility that Sylvia's recollection was faulty because the event was remote. This factor suggests trustworthiness. Sylvia gave her statement the same day of the stabbing, so there is little chance that the events faded in her memory. And although she admits that she had been drinking that day, a breathalyzer test administered by the police indicated a blood alcohol content of .000. Thus, it is unlikely that Sylvia's recollection was faulty.

The final guideline is whether the circumstances surrounding the statement suggest that the declarant misrepresented the defendant's involvement. Sylvia arguably may have tried to misrepresent Michael's involvement in the stabbing, but as we have discussed, she apparently was trying to help him, not implicate him. The fact that Sylvia initially lied to police does suggest untrustworthiness under this guideline (as well as guideline



two). And to the extent that Michael's two inconsistent statements to the police constitute 'circumstances surrounding' Sylvia's statement, they also indicate untrustworthiness.

Overall, the nine-factor test fails to demonstrate that Sylvia's statement to the police was sufficiently reliable to satisfy the third prong of ER 804(b)(3) and the confrontation clause. But the State contends that Michael's confession shows the reliability of Sylvia's statement. Ordinarily, it is inappropriate to look at other evidence to establish a hearsay statement's reliability. *Whelchel,* 115 Wn.2d at 725. But in *State v. Rice,* 120 Wn.2d at 570, our Supreme Court found an accomplice's confession reliable after comparing it to another confession. The Court held that the accomplice's confession in a letter to his girlfriend was reliable and therefore properly admitted against the defendant. But the Court found the same accomplice's confession to police unreliable based on the nine-factor test. Nonetheless, the Court held that the similarity between the two confessions made the police confession reliable and rendered any error in admitting the police confession harmless. In holding that the similarity made reliable an otherwise unreliable confession, the Court relied on *Lee v. Illinois,* 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986), for the rule that "[w]hen a codefendant's confession is virtually identical to that of a defendant, it may be deemed reliable as an 'interlocking' confession." *Rice,* 120 Wn.2d at 570.

But that reasoning does not apply in this case. Although the Crawfords' second statements to the police were very similar – on the day of the stabbing, they were hanging out drinking; someone mentioned Lee; Michael got angry; he and Sylvia set out looking for Lee; they went

to several bars and finally Lee's apartment; they initially knocked on the wrong door; Lee came out; the three of them chatted for a few minutes; Michael stabbed Lee; and the Crawfords ran away – the stories differ regarding whether Lee was armed when Michael stabbed him. Michael's second version asserts that Lee may have had something in his hand when he stabbed him; but Sylvia's version has Lee grabbing for something only after he has been stabbed.[2] The dissimilarity of these statements does

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[2] Sylvia's statement:

Q: Did Kenny do anything to fight back from this assault?

A: (pausing) I know he reached into his pocket . . . or somethin' . . . I don't know what.

Q: After he was stabbed.

A: He saw Michael coming up. He lifted his hand . . . his chest open, he might of [sic] went to go strike his hand out or something and then (inaudible).

Q: Okay, you, you gotta speak up.

A: Okay he lifted his hand over his head maybe to strike Michael's hand down or something and then he put his hands in his . . . put his right hand in his right pocket . . . took a step back . . . Michael proceeded to stab him . . . then his hands were like . . . how do you explain this . . . open arms . . . with his hands open and he fell down . . . and we ran (describing subject holding hands open, palms toward assailant).

Q: Okay, when he's standing there with his open hands you're talking about Kenny, correct.

A: Yeah, after, after the fact, yes.

Q: Did you see anything in his hands at that point?

A: (pausing) um um (no).

Ex. 42 at 6-7.

Michael's statement:

Q: Okay. Did you ever see anything in [Lee's] hands?

(Continued on following page)



not satisfy the reliability requirement of the confrontation clause and ER 804(b)(3).

The tests in *Whelchel* and *Rice* are designed to admit evidence that is reliable. They are not designed to elicit impeaching evidence, but to get to the truth of what occurred. In this case, Michael's and Sylvia's second statements are similar, but Sylvia's statement was plainly untrustworthy under the *Whelchel* and *Rice* tests. Thus, it was error to admit it. And because Sylvia's second statement is inadmissible, her first statement is also inadmissible.

And admitting Sylvia's statements was not harmless. A constitutional error is harmless if the reviewing court is convinced beyond a reasonable doubt that a reasonable jury would reach the same verdict had the error not occurred. *State v. Easter,* 130 Wn .2d 228, 242, 922 P.2d 1285 (1996). Here, Sylvia's second statement refutes Michael's claim of self-defense, because Sylvia said that Lee may have reached in his pocket after Michael stabbed him. And the State wanted to admit the second statement not to show that Sylvia's statements were the 'truth,' but

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A: I think so, but I'm not positive.

Q: Okay, when you think so, what do you mean by that?

A: I coulda swore I seen him goin' for somethin' before, right before everything happened. He was like reachin', fiddlin' around down here and stuff . . . and I just . . . I don't know, I think, this is just a possibility, but I think, I think that he pulled somethin' out and I grabbed for it and that's how I got cut . . . but I'm not positive. I, I my mind goes blank when things like this happen. I mean, I just, I remember things wrong, I remember things that just doesn't, don't make sense to me later. Ex. 44 at 7.

to show that Michael is a person who lies and would get the person closest to him, Sylvia, to lie in the first statement. The overwhelming message is that the jury cannot trust Michael's story. There is a reasonable doubt that the jury would have reached the same verdict in the absence of Sylvia's statements; thus, admitting the statements was reversible error.

3. *Lilly v. Virginia*

Crawford argues that the U.S. Supreme Court's decision in *Lilly v. Virginia,* 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999), requires exclusion of Sylvia's out-of-court statements. In *Lilly,* the Court determined that the admission of a non-testifying accomplice's confession violated the defendant's Sixth Amendment right of confrontation. *Lilly,* 527 U.S. at 139. The Virginia court had admitted the confession on the ground that it satisfied Virginia's statement against penal interest exception to the hearsay rule. *Lilly,* 527 U.S. at 122. A plurality of four justices found that accomplices' confessions are not within a firmly rooted exception to the confrontation clause. *Lilly,* 527 U.S. at 134. Turning then to the "residual trustworthiness test" of the confrontation clause – whether the statement has "particularized guarantees of trustworthiness" – the plurality was unconvinced that the accomplice's confession was sufficiently reliable to be admitted without opportunity for cross-examination. *Lilly,* 527 U.S. at 137-38.

*Lilly* is on point in this case. In *Lilly,* the disputed statement did not fall under a firmly rooted hearsay exception, nor did it meet the Sixth Amendment's "residual trustworthiness test." Here, neither of Sylvia's



statements survives a confrontation clause challenge under the Sixth Amendment's "residual trustworthiness test" or under a firmly rooted hearsay exception. Thus, *Lilly* requires exclusion of both Sylvia's statements.

Reversed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

HOUGHTON, J., concurs.

ARMSTRONG, C.J. (dissenting).

I agree with the majority that the court erred in admitting those parts of Sylvia's statement that were not inculpatory.[3] But I disagree with the majority's conclusion that no part of Sylvia's second statement is admissible. Because Sylvia's second statement is the same as Michael's second statement in all important aspects, I believe the trial court properly admitted her statement as an interlocking confession under *State v. Rice,* 120 Wn.2d 549, 844 P.2d 416 (1993).

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[3] But it was harmless error. Michael objects to Sylvia's statements that he was "infuriated," "enraged," and "past tipsy," and that he said Lee "deserves a ass whoopin'." Ex. 42 at 4. The jury heard a tape of Michael's own statements to police in which he said he wanted to "kick [Lee's] ass," and that on the day of the stabbing he was "mad, mad . . . mad enough to go find [Lee]." Ex. 44 at 3. Thus, the jury would have reached its same verdict even if the trial court had excluded the non-inculpatory parts of Sylvia's statement; admitting them was harmless error.

The majority finds that Sylvia's and Michael's second statements differ in whether the victim, Lee, reached for something before or after Michael stabbed him. I disagree. Both said that Lee may have reached for something before or during the stabbing. Sylvia said Lee put his hand over his head, "put his hands in his . . . put his right hand in his right pocket . . . took a step back . . . Michael proceeded to stab him. . . ." Ex. 42 at 7. Michael said, "I could a swore I seen him goin' for somethin' before, right before everything happened." Ex. 44 at 7. Thus, the statements, although vague, are essentially the same on the critical question of whether Michael acted in self-defense. Moreover, neither Michael nor Sylvia mentioned Lee reaching for something until police raised the possibility that Lee was armed. Michael's statement is reliable because he was motivated to put the best light possible on his conduct. And Sylvia's statement is reliable because she too was motivated to put the best light possible on Michael's conduct. Yet neither could offer more than that the victim may have reached for something immediately before the stabbing.

Whether or not Lee was armed is certainly critical to Michael's claim of self-defense. But any dissimilarity in the Crawfords' statements regarding Lee being armed is minor. The majority confuses these two considerations and wrongly concludes that because the statements are slightly dissimilar on a critical issue, there is a critical difference between the statements. I disagree.

Moreover, even if we read Sylvia's statement as reporting that Lee reached for something after the stabbing, the statements are still the same in one essential fact: neither Michael nor Sylvia clearly stated that Lee had a weapon in hand from which Michael was simply



defending himself. And it is this omission by both that interlocks the statements and makes Sylvia's statement reliable.

In conclusion, I would hold Sylvia's statement was properly admitted because it interlocks with Michael's statement.

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SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

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| STATE OF WASHINGTON, Plaintiff, vs. MICHAEL D. CRAWFORD, Defendant. | ) | No. 99-1-1205-8 71683-8 |

VERBATIM REPORT OF PROCEEDINGS

(Filed Apr. 10, 2000)

BE IT REMEMBERED that on October 18, 1999, the above-entitled and numbered cause came on for hearing before the HONORABLE RICHARD A. STROPHY, Judge of Thurston County Superior Court.

APPEARANCES OF COUNSEL:

| | |
|---|---|
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| For the Defendant | HUGH J. McGAVICK<br>2415 Pacific Avenue, Suite A<br>Olympia, WA 98502 |

REPORTED BY: Aurora J. Shackell, Official Court Reporter C.S.R. No. SHACKAJ334KD

* * *

[7] THE COURT: All right. Your first motion in limine seeks a ruling that the defendant's wife is incompetent to testify because of her spousal privilege under RCW



5.60.060. Does the State intend to call [8] Ms. Crawford, I believe it's Sylvia Crawford, as a witness?

MR. LUND: Yes, Your Honor. We did subpoena Ms. Crawford, didn't list her on our witness list, and would call her if she were available.

MR. McGAVICK: And she does intend to invoke her spousal privilege to remain silent.

THE COURT: The State intends to call her as a witness in chief?

MR. LUND: Yes.

THE COURT: What is the – what offer of proof or summary can you give me of her intended testimony?

MR. LUND: Your Honor, what she would testify to is that she was present when the stabbing of Mr. Lee took place. She had gone there specifically with the defendant to show him where Mr. Lee lived so that Mr. Lee could, quote, kick his ass. She would also testify with regard to statements that she gave to the police. She gave three statements to the police. First was to Officer Don Heinze which was not a recorded statement. In that statement, she told Officer Heinze that she had been at Kenneth Lee's house that day with her husband, Michael Crawford, that the three of them were drinking alcohol, that Michael left [9] to go to the liquor store, that while she was gone, that Lee made unwanted physical advances toward her, that he laid on her, that he tried to kiss her, that he was trying to pull her clothes off, and that Michael came back, heard her screaming and was pounding on the door, that Mr. Lee got up off of her, went to the door, let him in, and that Michael started screaming and stabbed Mr. Lee. That's the first statement she gave to Officer

Heinze. Later, she was interviewed at OPD by Detective Gies, and she indicated pretty much the same story.

At OPD, Mr. Michael Crawford was also interviewed and gave a similar statement to hers, although there were several inconsistencies between the first tape-recorded statement given by Sylvia and the first tape-recorded statement given by Michael. That prompted the detectives – the second time, the interviewer was Sergeant Jim Costa, interviewed Sylvia. At that time, she admitted that she had been – had given a false statement, a deceptive statement to the police with regard to this supposed sexual assault by Mr. Lee. She said it hadn't happened this particular day, the day of August 5th, that it really had taken place some several weeks previously, maybe four weeks prior, and that her husband really had not been there [10] when it took place, that it was some other individual. And she went on to say that she and her husband had been at, I think, Sylvester Park, that they had been with some friends drinking, that the subject of Mr. Lee came up, that the defendant had become upset thinking about how Mr. Lee had allegedly made these unwanted advances towards his wife, and that Mr. Crawford wanted his wife, Sylvia, to take him to Mr. Lee's house so he could assault him. And she – because Mr. Crawford had never been to Mr. Lee's house, didn't know where he lived, Cynthia – or Sylvia Crawford, therefore, took him – escorted him to Mr. Lee's apartment, knowing that an assault was going to take place, was imminent, and they went there, and the assault did take place.

That's a thumbnail sketch, Your Honor, of what I understand from reviewing the police reports and her tape-recorded statements that she had indicated to the police.



THE COURT: Mr. McGavick.

MR. McGAVICK: Thank you, Your Honor. The statements offered by – first of all, I don't think there's a question, but that Ms. – Mrs. Crawford has the right to invoke this privilege, which she's doing. So I think we're on point number two, and that's the admissibility of her out-of-court statements to police. [11] There were three different statements. Those are inadmissible, because of the unavailability of this witness. And the most recent U.S. Supreme Court case from June 10th, '99, is *Lilly v. Virginia,* which held that in a situation similar to this – there were three folks who were accused of involvement of crime. One gave a statement, exercised his Fifth Amendment right to refuse to testify. The defendant, who was on trial, protested that he was denied his Sixth Amendment right of confrontation because of the absence of this speaker, and the U.S. Supreme Court stated that the confrontation clause did overrule – or did require that in order for that to be used against him – that it would be improper to use that against him.

It's also here – it's being offered to prove the truth of the matter asserted under no well-rooted, firmly-established exception to the hearsay rule. They are trying to show that Michael Crawford went over there to kick Kenneth Lee's ass, as they say, and to show his state of mind. There is no – no good basis for this.

The Supreme Court's concluding paragraph of *Lilly vs. Miller* [sic] – and I'm sorry. I just have a printed sheet which just has blank U.S. blank. At page 21 of their opinion, they state, "The admission of the [12] untested confession of Mark Lilly violated petitioner's confrontation clause rights adhering to our general custom of allowing

state courts initially to assess the affected erroneously admitted evidence. In light of substantive state criminal law, we leave it to the Virginia courts to consider in the first instance whether the Sixth Amendment error was harmless beyond a reasonable doubt." And they gave a couple of citations. "Accordingly, judgment of the Supreme Court of Virginia is reversed and the case is remanded for further proceedings."

THE COURT: That involved a spouse's testimony?

MR. McGAVICK: No, but it was a brother who exercised – he was unavailable because he exercised his Fifth Amendment privilege against self-incrimination on the witness stand. So it's not the identical privilege. It still is a privilege that denied the defendant his confrontation clause, right to confront his accusers.

And in that case, they stated a statement against penal interest is not an exception to the hearsay rule. That trumps the defendant's confrontation clause, right to confront his accuser in court in front of the trier of fact.

[13] THE COURT: Well, I don't have a cite to that case. It hasn't been – I haven't been provided a slip opinion. I don't know how to analyze it until I have a chance to see it.

MR. McGAVICK: I will make a copy as soon as court recesses and bring it to chambers, Your Honor.

THE COURT: The difficulty – well, my understanding of 5.60.060 is that it has two aspects to it: One, the competency issue, whether or not a spouse is ever competent to testify against another spouse; and the second is the privilege issue. The statute reads that a wife



shall not be examined for or against a husband without consent of the husband, nor can either during the marriage or afterward be without consent of the other examined as to any communication made by one to the other during the marriage. This exception shall not apply to criminal action or proceeding for a crime committed by one against the other. That's not the case here. Nor to a criminal action or proceeding against the spouse if the marriage occurred subsequent to the filing of formal charges. That didn't occur. Nor to a criminal action or proceeding for a crime committed by said husband or wife against any child.

So it appears that, even though, theoretically, a [14] husband and wife are involved in a criminal act as either co-conspirators or coprinciples [sic] and both of them give statements to police, they cannot be examined pursuant to their statements on the witness stand against the other.

Do both counsel concede that?

MR. LUND: I think that's the case, Your Honor.

MR. McGAVICK: Yes.

THE COURT: All right. That being conceded, then the other issue is whether or not, in view of that, the right of confrontation would be offended if extra-judicial statements made by one spouse about that spouse's own conduct or the conduct of the other spouse that had to do with the criminal act can be admitted against the non-declarant spouse pursuant to an exception to the hearsay rule.

You have indicated that you believe the *Lilly* case, which I don't have a copy of, calls into question whether or not that would be, if not a violation of the hearsay rule,

given the State's rule of evidence and application of hearsay rules would permit it, i.e., constitute a violation of the right to cross-examination, the Sixth Amendment right to effectively cross-examine. I have heard your argument, [15] Mr. McGavick. I'd like to hear further argument from the State.

MR. LUND: Your Honor, the State disagrees with Mr. McGavick's analysis here. First of all, with regard to Evidence Rule 801, statements made in furtherance of a conspiracy are not hearsay. They're not even hearsay. We don't have to worry about whether they fall into any firmly-rooted exception. They're not considered to be hearsay. And here, Sylvia Crawford knew that Michael Crawford was going to assault Kenneth Lee. She knew that Michael Crawford didn't know where Mr. Lee lived. She knew that by taking him, meaning Michael, to Mr. Lee's apartment, she would be facilitating that criminal act taking place. She is a co-conspirator. And the statements she talked to the police about were how she and Michael conversed about how – where Mr. Lee lived, where they went looking for him. So she's made statements about the conspiracy, how the conspiracy was furthered. So we have one way they're admissible under Evidence Rule 801.

The second is she – when she makes the statement to the police and comes clean about what had happened in terms of helping out with this assault, she's making that statement against her own penal interest, which is [16] an exception to the rule against hearsay under Evidence Rule 804. She also by making that admission admits that she deceived the police in an attempt to cover up Mr. Crawford's crime on a class A felony, which means that she has just admitted culpability to a class C felony, rendering criminal assistance in the first degree. And so the only –



the only consideration, then, is: Are her statements sufficiently reliable enough that Your Honor should admit them? And where the Court should turn there is the case of *State vs. Ryan,* which set forth several factors to determine reliability of these type of statements. And I apologize to the court, I haven't cited *Ryan* but will provide it to Your Honor.

THE COURT: Well, defense cited *Ryan.*

MR. LUND: Okay. They have the nine factors there. Did you set them out, Hue, in your brief?

MR. McGAVICK: They're not set out in full.

MR. LUND: But, Your Honor, the principle concern that *Ryan* has is – one of the principal concerns is the statement that was made by the person close in time to the event, such that it's reliable. Sylvia Crawford makes her statement to the police the same day, just a short period of time after she and Michael are picked up in downtown Olympia. So we have [17] recency [sic] is sufficient. The other is: Does she have motivation to misrepresent? She doesn't. Clearly, she says to the cops when they ask her to come down to the station, they say, will you come down to give a statement? She said, I will be happy to if it will help Michael. This is her husband. She loves him. She doesn't want to make any statements that are going to jam him up and dig a bigger hole for him. And so that provides great reliability to her statements and what Your Honor ought to consider in determining the reliability.

Another factor in *Ryan* is: Are the statements against her interest? I've already covered how they're against her penal interest. I don't have all the factors in front of me,

but I think if the Court does a *Ryan* analysis, it will determine that all or nearly all of those factors are satisfied in terms of the reliability of the statements she made. And I would further add that Mr. Michael Crawford himself gives a second statement to the police where he corroborates what she said. He says the same thing. He admits, yeah, when confronted by the detective, that is true, we did falsify that initial story. We weren't really there at his house drinking. The rape thing didn't really happen today. It happened before. Yeah, I was [18] pissed off. I was going to kick his ass. Sylvia did take, me over there and show me where it was. So he adopts her statement. So that's further corroboration for the reliability of that statement.

So everything is there for these statements to be admitted, and they should be admitted as substantive evidence. But as I mention in my brief, even if they're not admitted as substantive evidence, they absolutely need to be admitted so the jury understands how this investigation took place, why it is that the detectives had to bring Mr. Crawford back again for additional examination and why they had to focus on specific points, because they learned them from Sylvia. Because even if they aren't admitted as substantive evidence, the case I cited to the court, which was *State vs. Diana,* I believe, that clearly sets forth they're admitted for other purposes to show, you know, the state of mind of the third party in relying on it. In this case, it would be the detectives. But I think it's substantive evidence that's admissible.

THE COURT: Any rebuttal, Mr. McGavick?

MR. McGAVICK: Yeah, very briefly. Thank you, Your Honor. In furtherance of conspiracy is not a hearsay



exception, but it is a statement against penal interest. And I'm going to refer to the *Lilly* case [19] again. I know the Court is not familiar with that intimately, but that was a case where there were two brothers, Mr. Lilly and Mr. Lilly and a third fellow, a roommate of theirs, who broke into a house, stole, I think, nine bottles of liquor, three firearms and a safe. The next day, they engaged in a robbery. They discharged the weapons at some youths, I think, and were arrested. One of the Lilly boys gave a confession which was sought to be introduced against his brother who was going to trial. They were clearly involved in a conspiracy by any standard, at least the equal of what is being alleged here that Sylvia and Michael Crawford were engaged in.

The confrontational clause precluded use of his out-of-court – self-serving out-of-court statement that incriminated his brother because he was not available to confront. The same analysis applies here. I disagree with the prosecutor's assertion to the Court that the statements represent that Mr. Crawford went there to assault Mr. Lilly. The statements show that he went there to confront Mr. Lee. The statements of Sylvia and Michael –

MR. LUND: Your Honor, if I could just interject, the statements in both statements use the phrase "Kick his ass." That is what is said in the [20] tape-recorded statements. Isn't that right, Mr. McGavick?

MR. McGAVICK: Tell you what . . . I won't interrupt you if you won't interrupt me.

MR. LUND: I just wanted to clarify one point. We're in agreement?

THE COURT: I don't want counsel to engage in colloquy between each other. If there is an objection by one side or the other, make your objections, state your ground.

MR. LUND: My apologies to counsel and the Court.

MR. McGAVICK: Likewise. Next, close in time, these were not excited utterances. These – they had a chance to flee the scene. They were apprehended. They were questioned. They were questioned – she was questioned three times. Michael Crawford did give a second statement which the jurors will hear much about his first and second statements, and her statements don't need to go to the jury. They are being offered to prove the truth of the matter asserted, that Crawford went there to kick his ass. They're being offered to prove that he had an intent to assault or attempt to murder Mr. Lee, and they're impermissible for those reasons because they don't satisfy anything [21] sufficient to defeat the purpose of the confrontation clause.

THE COURT: I don't know how long these statements are and whether or not you have clean copies of – bench copies of each of the statements that you are seeking to admit in lieu of testimony of the witness. Can I be provided those this evening?

MR. LUND: Absolutely, Your Honor, yeah.

THE COURT: All right. I'm going to – I would like from the defense either a citation or copy of the slip opinion of the *Lilly* case. And from the prosecution, I would like copies of the two statements and a xerox of the *Ryan* case.

MR. LUND: Absolutely.



THE COURT: Forget the *Ryan* case. I can access that. Let's turn our attention to the other aspect of the defense motion in limine.

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SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

STATE OF WASHINGTON,
Plaintiff,
vs.
MICHAEL D. CRAWFORD,
Defendant.

No. 99-1-1205-8
VOLUME II

VERBATIM REPORT OF PROCEEDINGS

BE IT REMEMBERED that on October 19, 1999, the above-entitled and numbered cause came on for hearing before the HONORABLE RICHARD A. STROPHY, Judge of Thurston County Superior Court.

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REPORTED BY: Aurora J. Shackell, Official Court Reporter
C.S.R. No. SHACKAJ334KD

[37] THE COURT: After selection of the jury, the parties argued their respective motions in limine, and the Court took under advisement and deferred ruling on the



issue raised in the defense motion in limine to, in essence, preclude the State from introducing and admitting into evidence before the jury the defendant wife's testimony because of the spousal privilege under RCW 5.60.060.

The defense contended that Sylvia Crawford's out-of-court statements to the police were inadmissible pursuant to that statute and likewise inadmissible because of defendant's confrontation rights guaranteed by the U.S. and State's constitution. In argument, the defense cited *Lilly vs. Virginia*, decided June 10th, 1999, Justice Stevens delivering the opinion for the rather fractured but nevertheless apparently majority of the court.

The State argued that State Supreme Court decisions, namely, *State vs. Burden*, *State vs. Diana*, [38] allow the admission of such extra-Judicial or out-of-court statements by defendant's wife to arresting officers regarding what occurred.

The Court has analyzed the authorities cited, the evidence rule. At the heart of the State's position is the State's contention that the statements made by Ms. Crawford – there were two of them, and the State kindly provided the Court with the first statement given to Detective Gies by Sylvia Crawford at 7:03 p.m. August 5th, and the second statement given by Sylvia Crawford to Detective Sergeant Costa, which was at 2243 hours or 10:43 p.m. that same day. The State also supplied transcripts of statements made by the defendant, Michael Crawford, first to Detectives Gies and Costa at 8:00 p.m., and the second statement to Detective Gies and Costa at 45 minutes past midnight the morning of August 6th. I've reviewed those statements as well as an officer's report of Officer D. Heinze, who apparently was the first to confront

defendant and his wife, Sylvia, after the alleged assault, and he and officer Allen and Officer Dale in combination effected the arrest of the two individuals in downtown Olympia not too long after the alleged stabbing incident. I don't know what the exact time of arrest was.

[39] So prosecution argues that the statement of Sylvia Crawford is a statement against her penal interest because in those statements, she indicates her presence and that she had been at the scene at the time of the stabbing and ultimately in both the first and second taped statements given at 7:03 p.m. and 10:43 p.m. respectively, she opines that her first claim that her husband was defending her against an unwanted sexual advance by the alleged victim, Mr. Lee, during and shortly after Mr. Lee's attempted sexual advances on Sylvia Crawford provoked and prompted the stabbing. She opines that that first claim was not true and that really what happened was that a month or so – a number or [sic] weeks or up to a month before, while separated from her husband, she was at the Lee residence with another and when that other went to get beer. Mr. Lee attempted to force his sexual intentions on her, and that altercation was interrupted by this second individual returning from the beer store. And when she informed her husband with whom she was subsequently reconciling, in fact on the day or shortly before the day of this incident, which allegedly occurred on the 5th of August, she advised her husband of such, and her husband was angry, her husband being the defendant, and wanted to quote, "Kick some ass," regarding Mr. Lee but [40] did not know where Mr. Lee lived. So she took him to Mr. Lee's apartment and that there – she further states that there was some discussion regarding money owed,



and then there was an altercation wherein Mr. Lee was stabbed, she believed, three times by her husband.

Mr. Crawford's first statement parallels the wife's first statement. Mr. Crawford's second statement parallels the wife's second statement in that he admits there was no attempted sexual advances by Mr. Lee against Mrs. Crawford, Sylvia Crawford, on the date in question, but that he had learned about the attempted sexual advance from his wife shortly before going on August 5th to Mr. Lee's apartment with his wife, Sylvia, that he was mad about it and that he had thought prior to going there about kicking Mr. Lee's ass, to use the defendant's phraseology, and further had claimed to police in a second statement that he believed – he was aware of the fact that from past contacts and associations, Mr. Lee owed him money, and there was a discussion about money and there was argument and he believes he stabbed Mr. Lee. He says he stabbed Mr. Lee then are some mind games about whether or not he as opposed to perhaps Sylvia stabbed Mr. Lee, rather difficult for the Court to understand where that was going. But, in any event, ultimately, [41] his knife was – admitted that his knife was the weapon used to stab Mr. Lee and that he, the defendant, never gave his knife to his wife, that Mr. Lee was stabbed at least twice and that the defendant, Michael Crawford, had a cut on his right hand that took 12 stitches to close, and he's not exactly sure how he got that cut. But during the course of the jawing back and forth, he thought Mr. Lee was taking something from his pocket or reaching for something.

Mrs. Crawford never saw anything in Mr. Lee's hand and says in her second statement that after being stabbed, Mr. Lee's hands and arms were spread out wide and his hands were open, there was nothing in his hands, and he

fell to the floor. On the tape that the Court heard, the 911 tape, within moments after the stabbing, Mr. Lee had called 911 for assistance and the Court has heard a portion of his attempt to get help through 911 dispatcher wherein Mr. Lee indicates that two people came to his door and they said something about money and he was stabbed, and after a fashion, he was able to remember their names as Mike and Sylvia.

It is in that context that the Court analyzes the citations of authority and the evidence rules in play here, as well as the statute that has been cited. First of all, the parties have conceded that five – [42] that there is no issue as to privilege in that – or competency in that the wife is not being called to testify. The issue is whether or not the marital privilege under the state statute is offended by introduction of the wife's statement.

I have reviewed carefully *State vs. Burden* and *State vs. Diana*, principally *State vs. Burden*. In that case, the marital privilege was not in issue, or the marital communications privilege was not in issue. In the *Burden* case, the defendant was charged with multiple counts of theft, possession of stolen property and other property offenses, and during the course of the investigation of his crimes, the police became aware of inculpatory statements by Mary Burden to third persons, including statements to her pastor, her brother, Kitsap County police officers and department store cashiers. On defense motion, the trial court granted a motion ruling testimonial privilege barred admission of such testimony to others. The supreme court reversed the trial court upon certification of the issue from the court of appeals. And in *State vs. Burden*, a 1992 decision written by Justice Dolliver, the Supreme Court stated that it rejected the defendant's assertion that



admission of Mary Burden's extra-judicial statements to others, third persons, [43] would indirectly violate the testimonial privilege and place the defendant in a position of having to waive the privilege to refute the testimony of the wife.

The court, in essence, found that the purpose of the testimonial privilege is to foster domestic harmony and prevent marital discord, prevents repugnance of having one spouse testify against the other, and prevents testifying spouse from having to choose between perjury and contempt of court or jeopardizing the marriage. The Supreme Court in *Burden* found the latter two purposes of the testimonial privilege not to be affected by allowing a third person to testify because the spouse is not testifying in court. The *Burden* court stated that there, it was not a case where the prosecution called a spouse to the stand. The spouse had testified under those circumstances, that common law rule would be violated. However, not calling the spouse to the stand but having a third person testify as to the spouse's statements is one step removed from actual testimony by the spouse, and, therefore, there is no chance that the Court might be repulsed by a spouse actually testifying by his or her mate. There's, therefore, no chance that marital frictions will be aggravated, for there is a convenient buffer of a third person actually making the remarks [44] pursuant to testimony.

The Court noted the marital privilege and the rationale behind it has been extensively criticized as lacking modern justification. Although the ability of the privilege is not itself at issue, the Supreme Court was not convinced that the marital harmony rationale justifies a construction of RCW 5.60.060 which excludes third-person testimony of spousal extra-judicial statements. The court concluded

that privileges are narrowly construed to serve their purposes so as to exclude the least amount of relevant evidence. So the Court views the statutory privilege reflecting common law as one that is narrowly construed so as to exclude the least amount of relevant evidence, and the Court quoted from federal cases that a person holds no privilege to prevent his or her spouse from making adverse statements abroad in the world, and if this occurs and revealed by a third person is the facts of the conduct of the spouse, not the advent of the trial, which is the source of any strain upon the marriage, when a marriage is deteriorated to the point where one spouse makes statements damaging to the other, that marriage will usually proceed to its fate regardless of how the spousal privilege is or is not applied.

So, in essence, with that rationale behind [45] analysis of this circumstance now before the Court, conclude that to introduce the statements of Sylvia Crawford given to third persons, namely, detectives arresting officers, would not be a violation of the marital privilege statute, and, accordingly, on that basis, the Court does not believe that the defense motion in limine is persuasive.

However, that does not end the inquiry. The second prong of defense objection to the statements is that if somehow it's not a violation of the marital privilege to introduce those statements, it's certainly a violation of the defendant's confrontation rights because the statement cannot be cross-examined. And defense relies on *Lilly vs. Virginia*. In *Lilly vs. Virginia*, the U.S. Supreme Court was reviewing the Virginia Supreme Court's admission at trial against a defendant in a homicide and other charged case, robbery and theft case of one brother's statement against another. The Virginia court held that for all purposes,



statements against penal interest were admissible, sufficiently reliable and as sufficiently rooted in a firmly-rooted hearsay exception, namely, against penal interest.

The Supreme Court disagreed. The Supreme Court held, in essence, that the confrontation clause ensures [46] the reliability of evidence against a defendant by subjecting it to rigorous testing in an adversary proceeding, such as by cross-examination of the declarant.

Here, statements are sufficiently dependable to allow their untested admission, that is, admission without cross-examination against an accused, only when the statements fall within a, quote, firmly-rooted hearsay exception, or they contain particularized guarantees of trustworthiness, such that an adversary would expect to add little, if anything, to their reliability. The Court went on to then trace the development of the firmly rooted hearsay exception rationale regarding statements against penal interest, concluded that a statement merely against penal interest defines too large a class to meaningful confrontation clause review. The Court then went on to reflect that statements which include statements of co-defendants, which shift their primary focus to the culpability to the co-defendant, the accused brother in the case, encompasses statements that are presumptively, given the history of this firmly-rooted exception evolution, unreliable, presumptively unreliable when the accomplice incriminates himself together with the defendant. Accomplice statements [47] that shift or spread blame to a criminal defendant, therefore, fall outside the realm of those hearsay exceptions that are so trustworthy that an adversarial testing can be expected to add little to the statement's reliability.

In the *Lilly* case, the declarant brother was in custody for his involvement in and knowledge of serious crimes. He made his statement under governmental authority supervision, was primarily responding to officer's leading questions and also had a natural motive to exculpate himself with respect to the most serious of the charges he was facing, ranging from theft to robbery to homicide and kidnap, and was under influence of alcohol during the interrogation. Those factors militated against the finding that his statement was so inherently reliable that cross-examination would have been useless or superfluous.

Not only were the confessions, incriminating portions, not a declaration against penal interest in regard to the homicide, but these statements were a part of the custodial confessions of the sort that this court has viewed with special suspicion given a co-defendant's strong motivation to implicate a defendant at trial and exonerate himself.

[48] So it's in that light that the Supreme Court in *Lilly* held that hearsay exception is firmly rooted if, in light of longstanding judicial and legislative experience, it rests on such a solid foundation that admission of virtually any evidence within it comports with the substance of the constitutional protection. This standard is designed to allow the introduction of statements falling within a category of hearsay whose conditions have proven over time to remove all temptation to a falsehood and to enforce as strict an adherence to the truth as would the obligation of an oath and cross-examination at trial.

So, in essence, the U.S. Supreme Court reversed Virginia Supreme Court's holding that any statement against penal interest is admissible, because it's a firmly-rooted exception to the hearsay rule. The Supreme Court



went on to discuss how one would analyze this third category of hearsay statements that they deemed inherently unreliable, that is, a confession by an accomplice which incriminates a criminal defendant. First, the Court distinguishes and looks at the statement as a whole and distinguishes whether or not the accomplice's confession inculpates themselves and the accused or exculpates themselves and inculpates the accused regarding the more serious of the offenses to [49] which the declarant is confessing. The Court reviewed the Crawford decision where the U.S. Supreme Court stated that even when an alleged accomplice testifying his confession that incriminates himself together with the defendant, ought to be received with suspicion and with the very greatest care and caution and ought to be passed upon by the jury in the same rules governing other and apparently other credible witnesses.

The admission of non-testifying accomplices' confession which shifted responsibility and implicated the defendant as the triggerman plainly denied the right of cross-examination secured by the confrontation clause of the U.S. constitution in *Douglas vs. Alabama*. The Court further opined that accomplice confessions ordinarily are untrustworthy precisely because they're not unambiguously adverse to the penal interest the declarant, but instead are an attempt to minimize the declarant culpability. "We once again noted in *Williamson vs. United States*," says our U.S. Supreme Court, "the presumptive unreliability of the non-self-inculpatory portions of the statement. One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature.

So the key problem before me, when I analyze the [50] statements of Sylvia Crawford, is to determine whether or not her statements were against her penal interest in the context that the Court consider a firmly-rooted exception to the hearsay rule, and, that is, was her statement primarily against her penal interest. When court can be confident, as in the context of hearsay falling within a firmly-rooted exception, that the declarant truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility. The Sixth Amendment's residual trustworthiness test allows admission of the declarant statement.

So my mission is to determine whether or not the context of her statements falls within a firmly-rooted exception. In other words, is her truthfulness so clear from the surrounding circumstances that the test of cross-examination would be of marginal usefulness? If I can conclude that, then the Sixth Amendment's residual trustworthiness test would allow admission of a declarant potential co-defendant confession.

Here, I have the wife of the defendant who says to the police, look, I'll talk to you, I'll do anything to help my husband. So her intent at least superficially is to help her husband. It's not to exculpate herself and inculpate him. How does she attempt to help her [51] husband, arguably? By first saying that her husband was confronted with her being assaulted by Mr. Lee and went to her defense and a confrontation ended up in a stabbing. Then she changes and says, no, it didn't happen that way when confronted by police with the fact with what she's saying is somehow inconsistent with what her husband is saying. And she says, no, we went there, my husband was upset, there was an argument, there was a stabbing. My husband was



upset because I told him that Mr. Lee had in the past approximately a month earlier made unwanted sexual advances against me, and, therefore, disrespected me and breached the trust of friendship.

Mr. Crawford gave statements much to the same effect. So what is there that would be of benefit by cross-examination? The statements are fairly parallel. The statement is, in essence, against Ms. Crawford's penal interest because she was present under the first version and assisted Mr. Crawford to get away under that version. Her statement is against her penal interest in that, given the second version, she agreed to show the defendant where Mr. Lee lived so the defendant could confront Mr. Lee because of his anger at what she claimed Mr. Lee had done to her or with her, and she assisted her husband thereafter. Is the [52] thrust of her statement an attempt to shift blame, exculpate herself and inculpate the defendant?

I find and conclude that that's not demonstrated here. If anything, my assessment of her statement is she thinks Mr. Lee under either version had it coming, and even says words to that effect about the matter at one point. I can't recall exactly when.

So when I take the statement of Sylvia Crawford in the context of the statement of the Defendant Crawford, I do not find that it is unreliable and untrustworthy. It's not dissimilar to the defendant's own statement. When I take it in a vacuum, not measured against any other evidence known at the time or understood at the time, I think it's a closer call. And given, I believe, *Ryan,* if not *Ryan,* the other commentary in *State vs. Burden* and *State vs. Diana*, the statement as a whole comes in whether part of it is

exculpatory or inculpatory or favorable or unfavorable to the declarant.

In light of my analysis, it is my suggestion that the way to avoid the potential for error on review would be for the State not to offer the wife's statement in its case in chief, since the defense has listed the wife as its witness. If the defense offers her testimony, she can be confronted not only in [53] cross-examination regarding her direct testimony, but with what she had said or not said in her statement, both statements one and two.

If the wife does not testify, the State has certainly the statements of the husband, as well as the direct eyewitness testimony of Mr. Lee, the alleged victim. In fact, the statement of the husband might arguably not even be necessary, given Mr. Lee's – what I anticipate would be his direct testimony, and that it would be for the defense to explain it. Well, without going further, I am concluding, given my analysis of the statements and the standard set forth in *Lilly vs. Virginia,* that the type of potential accomplice statement against penal interest made by Sylvia Crawford is sufficiently reliable concerning what occurred at the time of the stabbing and with respect to who stabbed Mr. Lee that I would not preclude the State from attempting to admit it in its case in chief.

And so that is my ruling, in essence, with some dicta, as I have suggested so as a way to avoid the appellate issue that would be raised by application of *Lilly vs. Virginia*.

Either counsel have questions regarding my ruling?

[54] MR. LUND: Not with regard to that ruling.



MR. McGAVICK: Yeah, I do, Your Honor. Thank you. Neither side identified to the jury when they read the list of witnesses the name of Sylvia Crawford, and she is on the written list. But based upon what the parties discussed

THE COURT: I might have misunderstood you when you listed your witness. I was glancing at your list of witness, and I thought you said her name as well.

MR. McGAVICK: Her name is on there. I explicitly did not read it. I jumped over that.

THE COURT: I may have missed that.

MR. McGAVICK: The State did not read her name, I believe.

MR. LUND: I did not.

MR. McGAVICK: Based on 5.60.060(1), the first part of our motion in limine, we agreed she has a right to invoke that. The jury has not been told she's coming. I'm unclear about the scope of your ruling in light of the fact that she is to invoke her marital spousal privilege. Does that have any bearing on your ruling?

THE COURT: I don't understand your question. I saw her on the list of witnesses. I [55] thought she was named. My suggestion was, by way of dicta, one way out of the issue of error it for the State to reserve use of her statement at all and see if she testifies as it appears she would be, given the fact she was listed.

Now, if she doesn't testify, the State doesn't use the statement, has plenty of other evidence, from one point of analysis, then there's no issue. If she does testify, her

statements can be used to cross-examine her by the State and be referred to in cross-examination and there's no offense against the confrontation clause because she's there.

MR. McGAVICK: Right.

THE COURT: That's the easiest way, from this Court's view, to avoid any potential issue and error. But since the State has pursued introduction in its case in chief of the statements, you have objected on the basis of *Lilly*. I've analyzed *Lilly* and analyzed the circumstance of the statement, and I have not found, although I have indicated I believe it was a closer issue than I earlier anticipated, that her statement was so unreliable that it would offend the analysis of *Lilly* and that's because it's consistent with regard to her involvement in both cases, with the exception of the timing of the alleged unwanted sexual [56] advances. It's consistent with what she said all three ways. It's given in the context of her desire to help her husband and explain basically that, in effect, from her point of view, Lee had it coming, or something coming in the nature of a, quote, "ass kicking", and so it doesn't tend to primarily be for the purpose of shifting blame from her to the husband. And when I consider that in light of what the husband says, basically, that he stabbed the victim and his knife was used to stab, although he claims some anticipation maybe the alleged victim had a knife, that's not inconsistent.

So, to me, cross-examination of Ms. Crawford would add little because the defense of Mr. Crawford is not that he didn't do it, but that he did it in either self-defense or defense of his wife, which is what I understood from you in your questions on voir dire and in your comments thus far.



So if I've got to make the call, I'm ruling it admissible, and I'm throwing out an alternative to the State to avoid pressing the issue, but I don't try the State's case. I don't try the defense case.

MR. McGAVICK: Sure. I appreciate that, Your Honor. May I address a couple of points that I would like to bring to the Court's attention to clarify this?

[57] THE COURT: Yes.

MR. McGAVICK: We have sought to exclude any reference to these statements as a whole. I believe I understand the Court's logic, and I appreciate the time and consideration you've given to this lengthy confusing U.S. Supreme Court case and all of the transcripts of the statements which you've thoroughly reviewed and grasped.

There are two parts in here where I think if you're going to let any of it in, you should sanitize the two parts where she's speculating about her husband's state of mind. And one of those you've referred to, and she's saying at page four of eight, if you have her second statement there . . .

THE COURT: I have page four of eight.

MR. McGAVICK: Down about the middle where the answer begins with pausing, that's where the – in the third line of that answer about the middle of the page, "Mike, he's like, yeah, that dude deserves an ass-whooping," you know. And there's a statement which certainly is not in furtherance of getting her husband off. There's a statement that's certainly not looking out for his best interests, certainly not a statement to help him. And then if you go to page six of eight of Sylvia's second

statement, her first answer there is [58] evidence the State will be attempting to rely on if this is admitted to establish the state of mind of Michael Crawford, which she is surmising what his intentions were. And that says at page six of eight, the first answer towards the bottom, "So I think that as far as that goes, he was going to go over there and kick his ass. I think those were the actual intentions, but since Kenny was being a punk, I think it just made Michael more angry." "Was Michael mad?" "Infuriated." And then you go down to about the middle of the page.

THE COURT: I guess I'm confused whether the first or second statement. And now we're in a whole different issue that has not yet been raised to the Court, and that is now sanitizing the statements. And, frankly, I don't want to spend a great deal of time other than to give you the opportunity to say what your concerns are at this juncture. That may have to be done outside the presence of a jury at a more manageable time. Are you talking about page six of eight of the second statement?

MR. McGAVICK: Right. Which is the one at the top. It says Detective Sergeant Jim Costa first.

THE COURT: I have that.

MR. McGAVICK: The first answer, the first [59] and second answers on that page.

THE COURT: On page six of eight?

MR. McGAVICK: Down at the bottom, it says page six of eight. The first question begins "Okay, I need, I need –"



THE COURT: Right, I see that. Okay. Now I've caught up to where – so I think that as far as that, he was going to go over there. So I don't know what you're asking.

MR. McGAVICK: Well, in the last paragraph of *Burden* says that the marital privilege doesn't exclude these statements. The testimony, however, must still meet other requirements for admissibility. There's no hearsay exception to satisfy these statements as to her speculation as to his state of mind. And a statement she gave to someone else, that is uncross-examinable here.

THE COURT: Well, maybe the answer is that the State calls the witness to the stand and by individual direct question ask the witness what was asked and what the wife responded. That's what we get into when we start admitting these statements carte blanche. It's a pick-and-choose problem. I want to get started with the jury. A lot of these could have been subject to pretrial motions in limine in advance [60] of the day of trial. I told the jury to be here at 8:45 because I thought we could start fairly close to that time. Now I've got them waiting again. I want to proceed. If we need to hash this out for another half an hour, tell me what we need to do or else I'm going to proceed and go ahead, I'm going to tell the jury to go home for the morning or the day. If it's the intent of counsel – it's the request of counsel to go point by point throught [sic] the statements now that I've made the ruling, we need to do that at another time before there's any reference to the statement or their admission.

MR. McGAVICK: Your Honor, I appreciate the inconvenience and delay which the Court is frustrated with. I'm frustrated as well. There's a lot at stake here for everybody and especially Mr. Crawford. I think if the State

would stay away from these issues and perhaps we could come in early tomorrow morning and revisit them, perhaps we could discuss this afternoon how we could take up parts of Sylvia's statements where she tries to establish her husband's intent. There's a lot at stake. I'm willing to go forward with the jury, but I think until this is –

THE COURT: Well, I have had no motion before me or no particular points raised to me by defense as [61] to, on the assumption the Court would rule the statements admissible, what portions of the statement are nevertheless under the rules of evidence inadmissible. The way I'll tackle this, I will rule even though statements one and two are admissible under the *Burden* and *Lilly* criteria, that they don't come in in their transcript form, that the statement taker is going to have to testify as to what he was told by Ms. Crawford, and then, that way, counsel can direct the attention of the detective to what statement made by Sylvia Crawford he wants admitted by the testimony of the detective who took the statement.

MR. McGAVICK: So I understand that to be the end of this discussion.

THE COURT: Well, that's what I'm ruling right now. And then if you want to take up before that happens further request to tell me in particular what you want stricken from the statement, either one or both of the statements, then I guess we'll have to have a further hearing outside the presence of the jury. I'm not going to preclude you from doing anything. I just want to know what you want to do so I can manage the jury.

MR. McGAVICK: I appreciate that, Your Honor. I will attempt to be more specific, and I will [62] have something for this Court's consideration either by the end



of business today or early before the regular court convening time tomorrow.

THE COURT: Okay. Mr. Lund, can you make any response?

MR. LUND: Not to that issue now because of the time.

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SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

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| STATE OF WASHINGTON, Plaintiff, vs. MICHAEL D. CRAWFORD, Defendant. | ) | No. 99-1-1205-8 VOLUME III |

VERBATIM REPORT OF PROCEEDINGS

(Filed Apr. 10, 2000)

BE IT REMEMBERED that on October 20, 1999, the above-entitled and numbered cause came on for hearing before the HONORABLE RICHARD A. STROPHY, Judge of Thurston County Superior Court.

APPEARANCES OF COUNSEL:

| | |
|---|---|
| For the Plaintiff State of Washington | ROBERT LUND<br>Prosecuting Attorney's Office<br>2000 Lakeridge Dr., SW, Bldg 2<br>Olympia, WA 98502 |
| For the Defendant | HUGH J. McGAVICK<br>2415 Pacific Avenue, Suite A<br>Olympia, WA 98502 |

REPORTED BY: Aurora J. Shackell, Official Court Reporter C.S.R. No. SHACKAJ334KD

[139] THE COURT: The clerk has given me three versions of the second statement of Sylvia Crawford: Apparently an original without any changes; apparently one that has changes lined through it; and then one that has been redacted.



MR. McGAVICK: Right. Your Honor, I think if I may be heard, I think we can simplify this. Mr. Lund and I have agreed to redact pages four and six on a few of the – if you look at the – if you look at the lines copy on page four, you'll see in red is – or underlined, we've agreed those statements should not go to the jury.

THE COURT: All right.

MR. McGAVICK: And I'm prepared to redact – and then also on page six, there's another two or three lines which we agreed should be redacted.

THE COURT: Now, there's one there that you have yellowed out.

MR. McGAVICK: Right.

THE COURT: There are two areas of page four that are yellowed on your lined copy, and those don't appear – those not underlined yellowed portions do not appear to be redacted; is that correct?

MR. McGAVICK: That's correct, Your Honor. And the reason for that is, I proposed that those [140] things which are yellow highlighted on your copy but not underlined, I proposed to Mr. Lund that those be stricken. He disagreed. I think the Court's already addressed this. I will just say I would urge the Court to strike those based on my client's confrontation clause, right to confront his accuser about statements regarding what his state of mind and what his intent was.

THE COURT: All right. Well, those yellowed portions of page four of eight that were not underlined and therefore not redacted, I believe, are admissible. The one in the middle of the page is, I think, a fair reference to what Mike had apparently said. "Mike, he's like, that – yeah, that dude deserves an ass-whooping, you know." That attributes that – more a statement to him than a conclusion that she made. On the lower portion, she has indicated her assessment of his temperament at the time and his sobriety, which is an appropriate allowable – I should say, subject of lay opinion.

Now, the next pages, apparently six of eight, my inclination is to allow that yellowed portion, as well. Again, there's enough of a basis for it in that she qualifies that she had seen him mad, been with him for years. She's seen all sides of him. She later in [141] further questions and answers qualifies her answer and asks the questioner to qualify the question as to what is out of control, such that I believe I would allow those questions and answers.

MR. McGAVICK: I appreciate and respect your rulings. If I could just make one point . . .

THE COURT: Go ahead.

MR. McGAVICK: On page four, the part where "Mike, he's like, yeah, that dude deserves an ass-whooping," from my reading of that, it's unclear whether that's her impression or a quotation of a statement. Doesn't say Mike said, yeah, that dude deserves an ass-whooping, so I believe it's ambiguous and should be kept out as speculation on Mrs. Crawford's part.

THE COURT: And I understand your point. Could perhaps be that way, but I think more likely than



not, in the context of her further answer she gave prior to that phrase, she said, "It led up to it. We were talking about something, or someone mentioned Kenny, and Mike, like he's" – when I hear young people talk, they don't say "he said" or "she said". They say "he goes," "he's like," da da da. So that's my thinking in allowing that.

MR. McGAVICK: Very good. And I would [142] request a continuing objection to all of these as noted in the motions in limine.

THE COURT: Your objection is noted, and –

MR. McGAVICK: Thank you.

THE COURT: You have given extensive argument before, and this gives me an opportunity, frankly, to make more complete the record on my rationale for allowing it under the *Lilly vs. Virginia* and *State vs. Burden* and *State vs. Ryan* cases. In these cases, reliability and trustworthiness is the focus of the Court. As the *Lilly* court opined, that the central concern of the confrontation clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact when the government seeks to offer declarant out-of-court statements against the accused. And, as in this case where the declarant is unavailable, courts must decide whether the clause permits the government to deny the accused his usual right to force the declarant to submit to cross-examination, the greatest legal engine ever invented for the discovery of truth.

The court further opined in ruling on the statement, that issue in the *Lilly v. Virginia* matter, in the trial court, the U.S. Supreme Court said, "We [143] assume, as we

must, Mark's brother's out-of-court declarant statements were against his penal interest as a matter of state law. But the question whether the statements fall within a firmly-rooted hearsay exception for confrontation clause purposes is a question of federal law." Accordingly, it is appropriate to begin – or to make their analysis by examining the firmly-rooted doctrine and the roots of the against penal interest exception.

The court in *Lilly* analyzed statements against penal interest which are offered into evidence in three principle situations: The first is a voluntary admissions against the declarant; the second as exculpatory evidence offered by a defendant who claims that the declarant committed or was involved in the offense; and, thirdly, the evidence offered by the prosecution to establish the guilt of an alleged accomplice of the declarant. And the Court discussed the first category of statements, those that were made as voluntary admissions against the declarant in the context of *Bruton* analysis and *Gray vs. Maryland, Richardson vs. Marsh* talked about redacting and the Bruton issue.

The second category, statement by a declarant against penal interest, which were offered as [144] exculpatory evidence by a defendant who claims that it was the maker of the statement, rather than he, who committed or was involved in the crime in question.

We don't have that second category involved here, because the defense is not attempting to admit the statement of Sylvia Crawford in attempt to exculpate himself or exonerate himself. The Court then turned its attention to the third category of cases in which the government seeks to introduce a confession by an accomplice which incriminate a criminal defendant, statements that, when offered



in the absence of the declarant, function similarly to those used in the ancient ex parte affidavit system, in the Supreme Court's view, and, therefore, was deemed inherently unreliable.

However, as the Court continued in its analysis, to look at those types of alleged accomplice statements which incriminate the accomplice together with the defendant ought to be received with suspicion, and the very greatest care and caution ought to be passed upon by the jury under the same rules governing other and apparently credible witnesses. The admission of a non-testifying accomplice's confession which shifted responsibility and implicated the defendant as the trigger man plainly denied the defendant a right of [145] confrontation in *Douglas vs. Alabama*. However, the Court went on to discuss what was unambiguous versus an ambiguous statement adverse – ambiguously adverse to the penal interest of the declarant, and statements that are likely to be an attempt to minimize the declarant culpability. And the Court finally concluded that in a case of an accomplice or potential accomplice confession or statement against penal interest, that was not – that did not fall within a firmly-rooted exception of the hearsay rule.

And then the Court turned its attention to whether or not the inherent unreliability presumed or applied to such statements could be overcome and to be admissible under the confrontation clause hearsay evidence used to convict the defendant must possess an indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at the trial. Then they analyze the statement before them from that – that was before the Virginia court, statement of a brother who was in custody, who was

primarily responding to leading questions who had a natural motive to exculpate himself as much as possible.

Here, I concluded earlier that Sylvia didn't have a natural motive to exculpate herself, as much as [146] possible, since she – her statement regarding who was the stabber was consistent with the defendant's, and the thrust of her statement was to convince the police that the conduct of her husband was either in self-defense or in justified reprisal for an indignity she suffered at an earlier time.

But in analyzing further indicia of reliability pursuant to *Ryan* factors, the *Ryan* case admittedly was applying its reliability test to the statements of children who were under the age of ten years old, I believe four and a half and five years old. There, the trial court concluded the children unavailable by virtue of the fact simply they were under ten years old. The Supreme Court wasn't willing to make that broad a conclusion and ruled that just because a child was under ten years old did not render the child incompetent and, therefore, unavailable.

But then the Court went on and discussed indicia of reliability. While there may be some potential for a motive of a wife to lie she declared in her statement her motive was to assist her husband and, therefore, make a further statement. Her general character, not much is known about it. It is perhaps checkered, with respect to reliability.

MR. LUND: Your Honor, could I just [147] interject? We've run a criminal history of Sylvia Crawford. She has no criminal history.



THE COURT: Her statements were given to law enforcement, and, obviously, she is an adult. These statements were not made spontaneously. The timing of the declaration being contacted shortly after the alleged incident, and the relationship between the declarant and the witness, obviously, was a person that was being questioned by law enforcement, and, thus, the witness is a law enforcement agent, neutral to her and not someone who would be inclined to advance her interests and shade her version of the truth unfavorably toward the defendant. She didn't suffer from any lack of knowledge. She was an eyewitness. She did make express assertions about past facts, and the statement was made very close in time to the event, and, thus, the possibility of her faulty recollection is remote, and the circumstances surrounding the statement, I do not believe they're such of significant reason to suppose she made misstatements or misrepresented defendant's involvement with respect to who the stabber was and his state of mind.

Accordingly, by consideration of those factors enumerated in *Ryan,* and also with reference to *State vs. Paris* and *Dutton vs. Evans,* explain and further [148] illuminate my rationale given earlier.

Anything further, then, we need to review with respect to those statements?

MR. LUND: No, Your Honor.

MR. McGAVICK: No, Your Honor.

* * *

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,
Petitioner,
v.
MICHAEL D. CRAWFORD,
Respondent.

NO. 71683-8

**ORDER DENYING MOTION FOR RECONSIDERATION**

(Filed Dec. 12, 2002)

The Court having considered the Respondent's Motion for Reconsideration.

Now, therefore, it is hereby

ORDERED:

That the Respondent's Motion for Reconsideration is denied.

DATED at Olympia, Washington this 12th day of December 2002.

For the Court

/s/ Gerry L. Alexander
CHIEF JUSTICE

*147 Wn.2d 424*



**TRIAL EXHIBIT NO. 38**

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

[Caption Omitted In Printing]

**Case Number 99-6530**
**Detective Russ Geis Statement of Sylvia Crawford**

The case number is unknown at this point (99-6530). The time is approximately 7:03 p.m. The date is August 5, 1999. I'm Detective Gies of the Olympia Police Department. Also present is Sylvia

Q and what's your last name

A Crawford

Q Crawford. This statement's being recorded at the Olympia Police Department in a conference room. Sylvia, do you understand this statement is being recorded and is this with your consent

A yes

Q ok, please speak up

A yes

Q would you give me your full name and spell it please

A Sylvia Margarita Crawford SYLVIA-MARGARITA-CRAWFORD

Q would you give me your address please

A 8100 Dawn. DAWN Hill Drive, Olympia, Washington 98513

Q would you give me your home phone number

A 455-8738

Q do you have a work phone number

A no

Q would you give me your date of birth

A 3/10/78

Q Sylvia, this'll be your warning and waiver of constitutional rights. You have the right to remain silent. Anything you say can be used against you in a court of law. You have the right at this time to an attorney of your own choosing and have him or her present before and during questioning and the making of any statements. If you can not afford an attorney, you are entitled to have one appointed for you by the court without cost to you and to have him or her present before and during questioning or the making of any statements. You have the right to exercise any of the above rights at any time before or during any questioning and the making of any statement.

A I have a question

Q sure

A since I don't have a lawyer and can't afford one, would we be let go until there was lawyer present or what. How does that work

Q well, if you don't, if you can not afford one, one would be appointed to represent you

A yeah but one's not here

Q one's not here now. If you want a lawyer here before you say anything, you have the perfect

A will I be detained or will I be let go. (Inaudible) How does that work



Q I don't know if you'll be let go or detained more at this point or not. It depends on how the investigation continues. Ok, so I, I can't answer if you'll be detained longer or not, I don't know. At this point this is under investigation and that's, that's where we're at, at this point. Do you understand that

A uh-huh (yes)

Q is that yes

A yes

Q ok, cause the tape can't see your head

A yeah

Q do you want me to read it to you again or do you understand it

A I understand it

Q ok, what I'd like you to do is I'd like you to sign here signifying you understand those rights. Ok, and don't hesitate, Sylvia, to ask any questions. (signing) This is the waiver to your rights

A I (inaudible)

Q ok, listen carefully. I have read or have had read to me the above explanation of my constitutional rights and I understand them. I have decided not to exercise these rights at this time. Any attached signed statements are made by me freely, voluntarily, and without threats or promises of any kind. Do you understand that

A uh-huh (yes)

Q is that yes

A yes

Q ok, do you wish to waive your rights at this time. In other words, do you wish to talk to me now

A and get it over with or talk to you later and get it over with, with more advice on what's going on?

Q it's your decision. It's totally your decision. You can stop talking at any time. Like if I ask you a question and you don't wish to answer that question, you don't have to

A ok

Q do you understand that

A I don't have to answer any questions

Q you don't have to at this point if you don't want to

A ok

Q or you can just answer a few questions or you can answer them all, it's your decision

A I'll go for that

Q ok, does that mean that you'll waive your rights at this time. Ok, that's a yes

A yes

Q ok, don't hesitate to ask anything, ok

A ok and earlier while I sitting here, I heard officers talking outside and I heard one of them say they didn't believe me and that (inaudible) charges before here and yada, yada, yada and whatnot

Q ok, I don't know anything about that



A why would, why would they say that

Q I don't know why

A (inaudible)

Q I can't speak for them. All I can say is maybe they don't believe you. I don't know

A the officer when he came in and he said that it wasn't said but I know that I heard it. I'm [sic] know I'm not crazy

Q well, I don't know why they said it. I just called in from home, ok, so I don't know why they said it. I'm here, as I've told you earlier, to get to the truth

A yeah

Q that's why I'm here, ok. I can't say I don't believe you or believe you because I haven't had a chance

A (inaudible)

Q I don't know what's going on, ok, do you understand. Ok, I'd like you to sign here signifying you understand the waiver and you wish to waive your rights, ok

A alright

Q ok

A (signing) (speaking under breathe [sic])

Q ok, let's back up to this afternoon or maybe early this afternoon and who is Michael Crawford

A my husband

Q ok, and you and Michael apparently were at somebody's residence today, is that correct

A yes

Q ok, let's start at perhaps noon today. Were you with that individual from noon on today

A Nope

Q ok, were you with Michael

A yes

Q ok, how did you, and the individual that the other individual apparently involved, apparently (inaudible) name, Kenny

A uh-huh (yes)

Q (inaudible) say yes or no

A yes

Q ok, do you know his last name

A unh-unh (no) I don't

Q no, ok, when did you, how long have you known Kenny

A I think it's three or four years now

Q has Michael, your husband, known him for three or four years

A he's known him longer

Q longer, ok, and have you and Michael been to his residence before

A not together



Q ok, be sure you speak up. So you've been there alone with Kenny

A no

Q has Michael been there alone with Kenny

A not to my knowledge

Q ok, would you say that maybe Michael and Kenny are good friends

A (inaudible) yeah, they respect each other

Q ok, maybe drinking buddies, just friends

A (inaudible) moved away and I just got back into town not too long ago so

Q how long

A I've been back into town two months now ok

Q why did you move away. Were you separated from Michael for awhile

A um, yeah

Q ok, did you and Michael go over to Kenny's residence today

A yep (yes)

Q do you know where Kenny lives

A yes

Q do you know his address

A no

Q do you know the street

A no

Q ok, is it an apartment or a regular house

A apartment

Q ok, and what time did you and Michael go to Kenny's residence

A I don't know the time. It, it was, af. . ., it was late afternoon, (inaudible) early evening

Q ok, and why did you and Michael go to Kenny's residence

A to go drinking

Q ok, with Kenny

A with Kenny

Q had he invited you guys over

A yes

Q ok, be sure you speak up

A yes

Q ok, so you and Michael showed up

A yeah, we were all there

Q ok, who else was there

A Kenny

Q is that all

A yes



Q did you take beer with you or was beer already there

A he had said beer was already there we didn't take any with us

Q when did he invite you over

A like I said, early afternoon. We got downtown, walking around, doing our usual thing (inaudible)

Q oh, and then he invited over to come on over and go drinking

A yeah, well, (inaudible)

Q ok, be sure you speak up. So you guys arrived and started drinking

A no

Q what happened

A we arrived, looked for alcohol and there wasn't any so he sent Michael to go get some. (Inaudible) immediately he pinned me down

Q ok, we'll get to that, we'll get to that. So he sent Michael to go get beer

A uh-huh (yes)

Q did, is that yes

A yes

Q did he give Michael money to go get the beer or did Michael take his own money or what

A I don't (inaudible) as far as I knew, Kenny said it was his treat but I'm not positive

Q you already drunk

A I (inaudible) been drinking

Q during the day

A yes

Q and you felt you were pretty intoxicated at the time

A yeah, we were all just having a good time. We were all smiling and laughing and joking around

Q downtown

A um, yeah, (inaudible) met up with each other and we walked down to his place

Q ok, how long were there before Michael went to go get beer

A (inaudible) minutes (inaudible)

Q oh, not long at all

A no

Q ok, Michael left

A Michael walked out the door

Q and

A Kenny got up to lock it

Q Kenny got up to lock the front door. Is that yes

A yes

Q ok, did Kenny lock the front door



A I think so

Q what happened then. Did you feel anything strange at that point, when he was locking the door

A yeah, I asked him why he did that

Q and what did he say

A he said *oh, just because*

Q ok, be sure you speak up Sylvia

A he said *Oh, just because*

Q ok, what happened then

A what happened then he started asking me if I was drunk

Q and what did you say

A I was like, yeah, I'm a wee bit tipsy, you know, and, and, and he took he kind of like touched my leg, a little bit

Q your leg

A my leg

Q were you standing up

A no, sitting down on the floor

Q you were sitting on the floor

A yeah, (inaudible)

Q (speaking over) with your knees together like an Indian would sit

A yeah, yes, you know like

Q or kind of like a yoga would sit

A (inaudible) in kindergarten, you know, sitting Indian style (inaudible)

Q (inaudible) kind of like an Indian or yoga style

A yes

Q so you're sitting like that, did he get down and he got down and touched your leg

A he's sitting down (inaudible) at an angle (inaudible)

Q be sure to speak up and talk slowly, walk me through

A ok, and so then he touches my leg at first and I was like (inaudible)

Q right below the knee, you show me

A ok, yeah

Q ok

A below the knee and I asked him *what are you doing* and he was like *well, why did you come up here* and I was like *what'd you mean, to have a drink* and he was like *I know you came up here for one* and then the bed is right there, it's a studio apartment, and he pinned me on his bed

Q how did he pin you on the bed, did he lift you up

A (inaudible) no, he got up and he went over me and pinned me on the bed and I told him, (inaudible) I said *Kenny get off, Kenny get off* and he wasn't listening and he didn't get off and I just started screaming louder and I



don't think Michael headed to the store, I think he heard me screaming cause there was he didn't come back with beer and then Mike was pounding on the door and it was like *let me in* and I was like *Kenny get off* and Kenny got up. (Inaudible) and he started kicking the door, I think, it was loud, (inaudible) and I don't know what happened after that (inaudible) and then we ran

Q well, let's walk. How did you end up on the bed, is the bed on the ground, is the mattress

A yes, it's on the ground, it's not up or anything

Q it's a mattress basically

A yeah

Q ok, did he attempt to take off any of your clothes

A he was going like this and pulling (inaudible)

Q ok, so you got on grey

A sweat pants

Q kind of warm up pants, basketball style warm up pants, is that correct

A I guess

Q ok, and your waist is a stretch band around the waist

A (inaudible) stretch (inaudible)

Q ok, and what did he try to do with your pants, did he try to pull them out and then downward, or pull them down or what

A no, he had me and he was, I don't know, (inaudible) he did it his hands (inaudible)

Q waistband

A and he was pulling down, (inaudible) with my foot

Q ok, so he tried to pull your pants down and you were able to fight him off

A ok, I'm getting uncomfortable

Q is that correct

A yeah, it wasn't, yeah, I guess

Q ok, but he was not successful because you were able to fight him off

A no he wasn't successful, it wasn't really a fight. It was like a push more, it was

Q you were resisting

A yes

Q ok, and then you started screaming and then you hear

A I started screaming once he pinned me down, I said *get the fuck off me*

Q ok, and then a short time there after within maybe a few seconds, you heard Michael

A it was a couple minutes, he had to walk down the stairs and stuff. I don't know (inaudible) happened

Q ok, but within a couple of minutes, Michael was back banging on the door



A yes

Q ok, and Kenny got up and opened the door

A yeah

Q did you see what happened when Kenny opened the door

A I didn't, (inaudible) there's a wall there, I got up but I didn't, there's a wall there and then when I came around the corner, I realized that Kenny was bleeding and got blood on my pants and we ran. I was like Mike, (inaudible) *let's get outta here* and he was *well*, like you know, we were discussing what we should do . . . I don't know

Q was Kenny down on the ground at this point

A Kenny, (inaudible) when I came around the corner

Q right

A no, he was still (inaudible) just falling

Q just falling

A I think that's how some blood got on me

Q did you see

A I don't know

Q did you see if he had anything in his hand

A unh-unh (no)

Q did you see if Michael had a knife

A unh-unh (no) I was flipped out man, I just wanted to leave

Q ok, did Michael say anything about what had happened, think back

A he asked me if I was ok, he asked me if Kenny had hurt me, he asked me if, I was, yeah, he just asked me *are you okay, are you okay,* and I'm like, *yeah, are you okay,* you know, I said *what happened to your hand* he was like *I don't know* (inaudible)

Q ok, so he didn't tell you if he'd stabbed or if he had to self-defense or anything like that with Kenny

A unh-unh (no)

Q is that no

A no

Q ok, did Kenny say anything that you know of, is that no, like a uaaaaa (pain sound)

A grunted

Q that was it okay so you guys quickly left the scene

A yes, right away

Q did you ever see Michael carrying a knife or anything

A no, I asked him for a cigarette and he gave me one so his hands were free

Q did you see blood on his hands

A yeah, I asked him what happened to his hand

Q and what did he say

A he said *I don't know* (inaudible)



Q his hand was cut

A his hand was cut, pretty, he didn't let me see, it even (inaudible) cause I saw blood dripping from my sweater cause he had it covered up

Q ok, do you remember anything else Sylvia

A yeah, Mike gave me the cigarettes

Q ok, do you feel

A (inaudible) lighter

Q do you feel that when Kenny pushed you down and attempted to take off your pants do you feel like he was trying to sexually assault you

A yes

Q ok, did you at all, do you feel you, at all, that you gave him any indication that you would like to have any sexual activity with him

A no

Q ok, did he, while you had contact with him during the day from downtown to the apartment, did he at all advise you, before hand that he would like to have any sexual activity with you

A no, Mikey was right there, he would never say anything like that in from [sic] of Mikey

Q ok

A he was looped

Q he was looped

A (inaudible)

Q do you feel he was highly intoxicated at the time

A that I couldn't tell I (inaudible) intoxicated I couldn't

Q you weren't but you don't know if he was

A unh-unh (no) I was out having a good time, smiling, laughing and joking around, I and I wasn't, you know, (inaudible) you want anything, and (inaudible)

Q ok

A it's none of my business

Q ok, how come you didn't call police when you saw Kenny was hurt

A are you kiddin', to be honest I

Q I want you to be honest

A I'm not really too upset about the fact that Kenny got hurt

Q because of what he was doing to you

A yes, because of what he was doing to me

Q ok

A the fact that he didn't respect me, the fact that he wouldn't get off, yeah

Q ok

A what was I suppose to do, call the cops and say he was the one who tried to rape me



Q do you have anything else you can remember Sylvia, anything else at this point, ok, be turning off the tape at this time.

Transcribed
REG:kc

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**TRIAL EXHIBIT NO. 40**

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

[Caption Omitted In Printing]

**Case Number 99-6530**
**Detective Russ Gies/Detective Sergeant Jim Costa – 1st Statement of Michael D. Crawford**

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The case number is unknown at this point. The time is approximately 8:00 p.m. The date is August the 5th, 1999. I am Detective Gies of the Olympia Police Department. Also present is Detective Sergeant Jim Costa of the Olympia Police Department, and Mr. Michael Crawford. This statement is being recorded at the Olympia Police Department in a conference room.

Q Michael do you understand this statement is being recorded and is this with your consent

A yes

Q would you give me your full name and spell it please

A Michael Crawford or Michael David Crawford – MICHAEL - DAVID - CRAWFORD

Q would you give me your address please

A 1919 Evergreen Park Drive, Apartment 108 and that's in Olympia

Q would you give me your home phone number

A 352-2476

Q would you give me your work phone number

A I'm not currently working



Q would you give me your date of birth

A 11/22/77

Q this is the warning and waiver of constitutional rights. You have the right to remain silent. Anything you say can be used against you in a court of law. You have the right at this time to an attorney of your own choosing and to have him or her present before and during questioning and the making of any statements. If you cannot afford an attorney you are entitled to have one appointed for you by a court without cost to you and to have him or her present before and during questioning or the making of any statement. You have the right to exercise any of the above rights at anytime before or during questioning and the making of any statement. Michael, do you understand those rights

A yes

Q speak up a little bit

A yes

Q Michael, I'd like you to sign right there signifying that you understand your rights

A I admit I understand that I'm waivin' my rights (document being signed)

Q you've just signed the signature for the understanding of the constitutional rights and you're also, went down a little bit and signed the signature for the waiver to your rights, is that right

A yes

Q what I'm gonna do though Michael is, I'm gonna read them to you, okay? I know you, you want to waive

them, at least that's the indication you're giving but I want to read them to you, okay? Do you understand that

A yes

Q I have, this is the waiver: I have read or have had read to me the above explanation of my constitutional rights and I understand them. I have decided not to exercise these rights at this time. Any attached signed statements are made by me freely, voluntarily and without threats or promises of any kind. Michael, do you understand the waiver

A yes

Q do you wish to waive your rights at this time

A now, does that mean that . . . that if I choose to take that right again, I still can or

Q what, if you waive your right, it means I'm going to ask you questions. You're giving me the okay to ask you questions and you can stop talking at anytime

A okay

Q even if you give me the right to ask you questions and you don't wanna answer any of those questions you don't have to. If you just wanna answer one out of maybe 20 you can do that or you can answer all 20. It's your decision

A okay

Q do you understand that

A yes



Q okay, does that, now you've signed your name already. I'm asking you now, do you wish to waive your rights

A yes

Q okay. For goodness sakes, you have any questions you ask Detective Sergeant Costa or I, do you understand that

A yes

Q okay. Detective, I'd like you to sign there as a witness (document being signed). Michael, you're married to Sylvia

A yes

Q and that's Sylvia Crawford

A yes

Q okay, do you and Sylvia currently live together

A yes

Q okay, the reason I ask is I believe she gave me another address

A she was living at um, this guy Paul Blum's house for awhile. She just, she very recently moved back in with me

Q okay, but you are married

A yes

Q okay, and do you know a Mr. Kenneth Lee, I guess he goes by Kenny

A yes

Q how do you know Mr. Lee

A oh, we've known each other for years from downtown originally

Q drinking buddies

A that and then other things

Q give me an example of other things

A I don't wanna specify on that

Q okay, and does your wife Sylvia know Kenny

A yes

Q how long has Sylvia known Kenny

A um, about half as long as me, about 3 years

Q okay, so you've known him maybe 6 years

A yeah

Q give or take? Is that yes

A yes

Q okay, be sure you speak up. Did you and Sylvia walk downtown today and perhaps run into Mr. Lee or how did you run into Mr. Lee today

A we ran into him downtown

Q what time

A I don't, I don't even know what time it is now. I have no idea what time it is

Q it's a little bit after 8:00 o'clock now, at night



A must a been a few hours ago

Q would this of been the afternoon that you ran into Kenny

A yeah, it was afternoon

Q was it pre-planned that you run into him or was it by chance

A it was by chance

Q and so you guys ran into Kenny Lee downtown Olympia area

A yes

Q and what happened when you ran into Kenny Lee

A um . . . . well, I asked him about some money he owed us um, he told me to come by his place

Q okay, and he apparently owed you some money for perhaps some marijuana or drugs

A I (won't?) (inaudible) specify

Q okay, but he owed you money for something that you had given him in the past

A we had loaned him some money so that he could

Q okay, but, and he owed you money

A yes

Q and you asked him if he had the money, what was his answer

A he just said he'd probably ~~have~~ somethin' for me and told me to come by

Q his residence

A yes

Q had you ever been to his residence before

A I hadn't

Q do you know if Sylvia had ever been there

A um, she had told me about something that happened at one point but I wasn't sure

Q okay, can you be specific as to maybe something that happened

A she had told me that he tried something with her before. Someone else had to help fight him off her and she got away and I wasn't sure if I believed it cuz, I don't know, she's bullshitted me a few times

Q when you say something happened, does that mean perhaps he had attempted something of sexual activity on her

A yes, forcefully

Q okay, if it's true, why . . . did you agree to go to his place then after he said he might have something for you

A yes

Q was Sylvia with you at the time

A yes

Q did Sylvia go along with you

A yes



Q did you feel uncomfortable going there when Sylvia had said previously

A somewhat

Q but you went anyhow

A yeah, I figured I could handle it

Q were you under the expectation that he might pay you some money

A yes

Q did the three of you then walk to his residence

A yes

Q do you know where his residence is

A it's the brown apartments

Q do you know the address

A no

Q do you know the street they're on

A um, the one that goes up by Priest Point Park by AM/PM

Q by AM/PM

A yeah

Q off of that street that goes towards Priest Point Park

A yes

Q okay, so the three of you went to his apartment

A yes

Q speak up

A yes

Q okay, and did the three of you then go in the apartment

A yes

Q did you go for any other reason to the apartment then just to collect money from him? Was it possibly to visit, to . . . do drugs, to drink beer, any other reason but to collect money

A I wouldn't specify on that

Q okay. So, three of you went in the apartment

A yes

Q what happened then

A well, we agreed that I was gonna go to the store . . . and

Q why did you agree to go to the store

A (inaudible)

Q was there something missing that you needed

A yes

Q what was that

A I don't wanna specify

Q okay. Could it have been beer

A it could have been



Q okay. So you left the residence to go get something that could of been beer

A yes

Q who, did you have the money or did he give you the money

A I had some money and he gave me five bucks

Q okay, and how long were you in the apartment before you agreed to go get the item

A I'm not sure

Q guestimate

A guestimate. I would say under an hour but close to an hour

Q okay, and let, let's approximate then 45, 50 minutes. What happened that time that you were in the apartment during that period of time

A oh, we just bullshitted and stuff, and he told he'd get paid when he got his money or that he'd pay me some, somethin' and it was all cool, and he asked Sylvia if she was mad at him. So I knew something had to of happened

Q okay, so he asked Sylvia if she was mad at him and what did Sylvia say

A she said it was okay, so ya know

Q did that make you a little suspicious that maybe he had attempted something

A yes

Q so what you're telling me is you sat there for 45 and 50 minutes and just visited

A yeah

Q is that correct

A yes

Q okay, and then you decided you needed something so you took some of his, he gave you some money, you had some money and you left to go to the store

A yeah, well, he, he, he bought [sic] it up sayin' that he wanted some more ya know, and so I was like, okay

Q perhaps some more beer maybe

A perhaps

Q okay, continue

A and, and he, I asked him ya know, if he wanted to go to the store with me and he said he didn't wanna go anywhere so

Q speak up

A I started to go and then I felt comfortable leave, uncomfortable leaving Sylvia there and went back to go get her and I heard (audible) and they were fightin' by the door

Q okay, so you left the residence and closed the door behind you

A yeah

Q and would you describe where you went from there? Do you have to go down steps or up steps



A down steps

Q how many steps

A I don't know

Q a lot

A enough

Q 20

A maybe

Q okay, and where did you go when you decided you didn't feel comfortable and you turned around to go get her? Where were you at when you turned around

A um, I was close to AM/PM

Q okay, and this residence is very close to AM/PM anyhow, isn't it? Would you say you were half way to the AM/PM, a third of the way, two-thirds of the way

A I'm not sure

Q okay, but you never made it to the AM/PM

A no

Q okay. You decided to turn around and go back

A yeah, I started walkin' there and then I started walkin' back from the AM/PM and I was thinkin' 'Well, well, I don't know'

Q speak up

A and then I decided to go back and get her

Q kay, so you turned around, walked back

A yes

Q what happened then

A well, I went and, I heard something inside the door and I opened the door and they were fightin' on the floor

Q kay, you're at the door and what did you hear

A I heard her screaming

Q what was she screaming

A I don't remember

Q was it a distressful scream

A yes

Q and you opened the door or did he open the door? Or how did you, how did the door open

A I honestly couldn't, honestly answer that. I, I don't know if I opened it or if he opened it or if she opened it. I don't know

Q did you make any effort to knock on the door or yell in the door prior to the door opening

A I believe I said something

Q think back

A (pausing) I said something to Sylvia, I don't know, something like, 'What's going on? Or what's' something, I don't know

Q this is while you were outside the door

A yeah



Q kay, so some way or another the door opened but you don't recall how

A I'm not positive

Q when the door opened what did you see

A Kenny tryin' to hold her down . . . she was on the ground and he was like, on his hands and knees or on his feet squatin' [sic] down or somethin', just down lower than me

Q well, so, so I guess that would indicate if Kenny was down with her that would indicate apparently you're the one that opened the door

A possibly

Q okay. Let's describe the position that they were in again. Is there a wall that separates a room from the front door or could there be a wall separating any, any (inaudible)

A (pausing) I don't understand the question

Q walking through, the door's open and tell me what you saw again . . . . walking through . . . I think what I'll do . . . how about drawing me a picture. As best you can put the front door and . . . . and label everything because we'll need to know what everything is

A (pausing to draw picture) (inaudible) here's the door right here

Q okay, if that's not anything just cross that out then

A it's like a, it's like a hallway that goes in here

Q okay, and what's this

A I was thinking' the couch, but I'm not sure if it goes that way

Q okay, so this is a little wall here

A yeah, there's a wall that goes this way

Q okay, what's to the left as you walk in? Nothing? Just a front room

A this is the front room but I don't remember exactly where the couch was . . . . and they were like, right here

Q so where you've got them is right inside the front door

A yeah, it ended up out here somehow

Q outside the front door

A yes

Q okay, but let's, let's walk through what you're drawing. You opened the door and the door comes outward

A I don't remember

Q but there is nothing between you and them as they come in the door, is that correct

A (pausing) as they come in the door?

Q right. As, as, as he, as you come in the door you saw them plainly right inside the front door

A I don't even think I made it in the door. . . . I think that the fight came out the door

Q okay, but you said you looked in, you, and what did see, him and her on the ground



A yeah, right in the door

Q right in the door area

A like she was tryin' to get out the door or somethin'

Q and what position was she in

A she was on the ground tryin' to get up

Q was she on her knees or on, so she was, she looked like she was tryin' to get out the door

A yeah

Q and was she on her knees

A I, I don't remember

Q where was he

A he was like . . . . she was like, kinda like, right here . . . and he was like right here or it could a been reverse. He could a been right here and she was right here

Q okay, okay, but it was your thought she was attempting to get out the door

A that was my thought

Q what was he attempting to do

A he was trying to restrain her. He was yelling something, I don't remember what . . . fuckin' tryin' to stop her from gettin' out the door

Q okay, what happened then

A I don't know, I got aggressive at that point when I seen 'em and he got aggressive also

Q let's walk through what happened. Tell me what aggressive means

A I don't know, just, (inaudible) got in a fight with somebody, you start first yellin' at each other and then blows and . . . (inaudible) weapons, weapons start (inaudible)

Q well, did, when the door was there and you said they were right inside the door, you said it ended up a little bit outside. Did he get up and confront you? Did you confront him, what happened? Remember back, let's be specific

A (pausing) I kind of (inaudible) out when stuff like this happens, I mean . . . I could be tellin' you something, it might not be exactly how it happened

Q do you remember pulling your knife out of where it was

A I don't even remember pulling it out

Q do you carry a knife

A yes

Q where do you carry your knife

A on my belt

Q and is it on your right side of your belt or the left side of your belt

A usually the right side

Q and is it in a sheath

A yes



Q and is it, is the sheath something that you would maybe button over the top or is it the type of sheath that you can just reach and pull the knife right out

A you could, you could pull it out

Q okay, what kind of knife is it

A it's um, a filet knife

Q a filet knife. Give me approximate length

A mmm, 6, 7 inches

Q okay, do you recall pulling that out

A I recall putting it back

Q into the sheath

A yes

Q do you recall holding it or anything prior to that

A yes

Q what do you recall

A I recall getting my hand cut and I recall swinging the knife at him . . . and, and then Sylvia gettin' past. Once she was past me then we escaped down through the, the stairwell and just went from there and just were like, ya know (inaudible) 'What's goin' on?' (inaudible)

Q (inaudible) you recall swinging your knife, is that what you said . . . or pushing it or lunging it or what, what do you recall doing with your knife

A lunging, swingin'. We were backin' out the door. I don't . . .

Q was the knife in your right hand

A yes

Q so that would indicate evidently you pulled it out with your right hand

A I believe so, I'm not positive

Q okay, okay. Do you recall the knife striking him or any kind of a slash or a push into him or a swing at him that struck him

A yeah, I think I stabbed him

Q okay, do you recall how you stabbed him or what the motion was

A I believe it was a forward jab

Q okay, do you recall if it was one occasion, two or three

A I, I know I had to of got him once

Q how do you know that

A I felt, I felt, I don't know, I just felt (inaudible) ya know

Q you could feel the poke into him

A yeah

Q is that a good description, I don't know

A I don't know either, I

Q you know you got him once though

A I know (inaudible)



Q by a straight in stab

A yeah

Q okay, do you recall, think back, if you got him any other times

A I might of

Q you might of. Would those of been straight in stabs too, do you believe

A um, I, I'm not sure

Q kay, it's possible

A I was tryin' to but he was [illegible] and he had somethin'

Q kay, why were you trying to? Were you mad

A I was mad

Q kay, because you thought that he was doing something to your wife

A yes

Q and do you feel like your madness took over for a few minutes

A yes

Q do you know how your hand got injured

A I . . . I think he cut me with something. I may have tried to grab something in his hand(s). I'm not positive

Q do you recall him having anything in his hands

A I believe that he had something that he pulled from somewhere, one of his pockets or his belt or somethin'

Q you don't know what it was

A I recall him reaching for something. I remember my hand getting cut when I went to grab his arm

Q and when did he reach for something

A when we were in that confrontation of . . . when Sylvia was trying to get out the door, the door came open somehow and that's when he was reaching for something and that must a been when I reached for somethin'. I remember my hand gettin' cut

Q do you know, when you reached for your knife and you were swinging it and/or pushing it forward and striking him, do you know if he had tried to do anything to you yet or do you know if he attempted to perhaps come after you or was your hand cut after you had uh, swung your knife at him, do you recall

A I know, I know that it took impact outside of the apartment, which meant he was coming toward me. I remember him coming towards me and I know I didn't get him till he was outside of the apartment

Q okay, do you recall when your hand was injured? Was it during the altercation of you swinging the knife, could it, before or afterwards or do you remember

A I really think it was before

Q okay, you're not sure or you're sure

A at, at, at the beginning of the confrontation



Q okay, do you know how your hand got injured, with what instrument

A I don't know

Q did you ever see him with a knife

A I seen him pull something out of his, out of his belt. I don't know what it was

Q okay

A out of his pants or whatever

Q did he say anything to you

A I wouldn't remember if he did. He said something, I don't know what. I wasn't listening

Q what did you say to him

A I don't remember saying anything

Q was this a very fast confrontation? The door opened, before you knew it he was outside and before you knew it you guys were walking away

A it was very fast

Q okay, when did you realize your hand was cut

A well, I, I felt, I felt it ya know, at the beginning of the altercation but I didn't realize it was cut until I got down the road

Q you might wanna lift that up because it's bleeding pretty good (inaudible). Do you . . . (background activity) When did you put away the knife

A um . . . . outside . . . . when I felt comfortable. I, at first I just was holdin' onto it really tight and then when I,

I didn't see him comin' after us and that's when I put it away

Q why didn't you call police

A (pausing) I thought about it. We just walked down the street. I thought about catchin' a bus. I, I don't know, I've been in a lot of trouble and I just, I didn't know what to do. I mean, I, I thought about catchin' a bus then we decided not to catch the bus. We were thinking about calling the cops then the cops came to us

Q were you going to call the police or you don't know

A I may have

Q kay. When you were swinging the knife at him and lunging it into him, did you mean to hurt him? You were mad I take it

A (no audible response)

Q is that yes

A yes

Q okay

A I was mad

Q You were very mad

A yes. I realized that what she had told me earlier must of been true too

Q apparently about him trying something sexually on her

A (inaudible)

Q you meant to hurt him



A (pausing) I don't know if I meant to hurt him. I . . .

Q you were just

A probably part of me did

Q you were just in a, you might say a rage

A (pausing) you might say

Q okay. Detective Sergeant Costa

COSTA the injury that you have to your hand, did you do that to yourself

A I don't believe so

Q okay

GIES could you of? Perhaps as you were swinging and/or lunging at him could you have maybe, I don't know, been holding onto it maybe and actually sliced your own hand by accident

A I don't, I don't think I could a done that or, I mean, this is bad news. (Inaudible) he had, he pulled something out

Q okay. Why do you carry a knife

A protection

Q okay. Did Sylvia tell you anything after you guys left the scene as to what happened

A she was trying to but I wasn't really listenin'. I was just kind of in a panic mode

Q kay. When you left what position was he in? Where was he at

A he was at the like, on the stairway, at the top of the stairway

Q standing? Down? On his knees

A he was standing

Q he was. Was he crouched over

A he'd got into a defensive mode after I got him once

Q okay, do you know how many times you stabbed him

A no

Q do you have a guess

A once, maybe twice

Q okay

A (pausing) I asked her (inaudible) she said I, she thinks I got him three times

Q how did you try to stop your bleeding on your hand

A I was just holdin' it with my shirt

Q okay. Do you have anything you'd like to add

A no

Q have we coerced you into saying any of this or threatened you or anything

A no

Q kay . . . kay, Detective, what time is it now

COSTA 8:28



GIES time is now approximately 8:28 p.m. It's still August 5th, 1999, and we'll be turning off the tape at this time.

Transcribed:
REG/JDC:jp

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**TRIAL EXHIBIT NO. 42**

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

[Caption Omitted In Printing]

**Case Number 99-6530**
**Detective Sergeant Jim Costa – 2nd Statement of Sylvia Crawford**

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This will be the statement of Sylvia Crawford. Today's date is the 5th of August, 1999. The time is 2243 hours. This statement is being recorded at the Olympia Police Department. Also present is Detective Holmes of the Olympia Police Department.

Q Sylvia, do you understand this statement is being recorded, and is this with your consent

A yes

Q would you give me your full name and spell your full name please

A Sylvia Margarita Crawford – S Y L V I A – M A R G A R I T A – C R A W F O R D

Q and your address

A 8100 Dawn Hill Drive, Olympia, Washington 98513

Q okay, you're gonna have to speak up just a little bit. Your date of birth

A 3/10/78

Q do you have a home telephone number there



A 455-8738

Q okay Sylvia, you've already talked to the police tonight, is that correct

A yes

Q okay, and uh, you understand at this point this statement is being recorded, correct

A yes

Q okay, before I ask you any questions and I explained this to you uh, earlier, but I'll go ahead and do it again. I'm gonna go through and read you your constitutional rights. You have the right to remain silent. Anything you say can be used against you in a court of law. Are you under the age of 18? No. Okay. You have the right to an attorney of your own choosing and to have him or her present before and during questioning or the making of any statements. If you cannot afford an attorney you are entitled to have one appointed for you by a court without cost to you and have him or her present before and during questioning or the making of any statements. Five: You have the right to exercise any of the above rights at anytime before or during questioning or making any statements. Now, do you understand each of those as I explained them to you

A yes

Q okay. The, and I told you earlier that uh, initially when the first Detective talked to you he didn't advise you of your rights, correct

A he advised me of my rights

Q did he

A he did

Q okay, so you understood them then too

A yes

Q okay

A and I, and I asked all the questions then

Q okay, you're gonna have to sit closer to this or we're not gonna hear you . . . Pardon

A just wrapping up my feet

Q okay um, on the bottom of this it says; I have read or have had read to me the above explanation of my constitutional rights and I understand them. I have decided not to exercise these rights at this time and it says, any statements, it says attached statements, but we're doing a, a taped statement, are made freely, voluntarily and without threats or promises of any kind. Is that true

A yes

Q okay, and I told you that you are not under arrest

A yes

Q and you understand that

A yes

Q and my reason for advising you of your constitutional rights was that uh, if you and I informed you that if you made a statement to me, an incriminating statement, that that statement could be used against you in a court, is that correct



A yes

Q okay. I was not present the first time you were interviewed by Detective Gies

A that's right

Q okay. I did sit in on an interview with your husband who is down here in our facility and I told you that, correct

A yes

Q and I came back in here what, about a half hour ago and I told you that there were some inconsistencies with the story that your husband had told us and with the first story that you told the Detective. Is that true

A yes

Q okay, and after we sat here for some time uh, you, I pointed out to you that I wanted the truth, is that correct

A yes

Q and you asked me to tell you completely what your husband had told us and then if I did that you would uh, let me know whether that was the truth or not, is that correct

A yes

Q okay, and I also told you that I wasn't gonna do that, correct

A correct

Q but I did tell you some of the things that your husband told us

A yeah

Q and after I told you that, you told me that you would tell me what really happened the night that you guys or what really happened tonight before you went over to this guy's house, correct

A yeah

Q okay. So I'm gonna start over again and go through that. This, what was the name of this person's house that you went over again

A Kenny

Q Kenny? Okay. You met Kenny in the past, correct

A yes

Q okay, tell me about happened, I told you that uh, your husband had told us that you had mentioned to him that something took place between you and Kenny in the past where he had done something sexual to you, correct

A yeah

Q and you didn't tell us that the first time, right

A nope

Q okay, if you can lean forward close to this or I'm not gonna be able to hear you and tell me what happened or tell me what it was and what happened between you and Kenny the first time

A the first time. . . . is that I came back into town and I ran into Kenny and . . . um . . . we had agreed to meet at The Reef, tavern or bar or whatever it is. Uh . . . and go drinking, thinking he was an old friend of ours . . .



ya know, why not . . . go have a few drinks. I . . . was going to a job interview that day and I was gonna go have some drinks afterwards with him. In the process we, he introduced me to like three other people . . . and this other guy went with us. After a few drinks were bought Kenny decided it was getting a little expensive and that we should just go get a bottle and go to his place and drink. Me, I'm seeing no reason not to trust Kenny, okay ya know, why not . . . so we went to his apartment in Steve's truck and . . . we went to a liquor store first, got a bottle of vodka, went up to his apartment . . . Kenny sent Steve to the AM/PM on the corner right by his house to go get some orange juice to mix with the vodka . . . and in the process Kenny had pinned me down and . . . was . . . tearing at my clothes and I was fighting back . . . there were scratches on his neck. And his, his skin under my nail for a few days . . . that was gross, and then, anyway um . . . we were fighting, we didn't get along. At that point I was screaming for him to get the fuck off me. He wouldn't get off me . . . Steve heard me screaming through the window, ran upstairs, yelled at Kenny to let him in. Kenny didn't respond. Dude said, "I'm gonna kick your door in! I'm gonna kick your door in!" and Kenny did not still respond. Dude did kick the door in and pulled Kenny off me and I fled with the dude to his car . . . and went to go get some cigarettes and . . . for one reason or another I'm not quite sure of, we were supposed to meet up with Kenny again at the park later on that night. We were screaming, I was screaming cuz he had stolen my wallet. I think that's the only reason why we did go meet back up with him. I realized my wallet was gone when I went to go buy him a pack of cigarettes I didn't have my ID . . . and um . . . there was an officer there that made him give me my wallet back . . . at that point . . . took off again with Steve. We go to a parking lot

and Steve was like, did, just, did what happen just really happen? Did it really happen? Is this really happening? And I'm like, 'Yeah, this is really happening' and he gave me his phone number. He's like 'Well, if anything is to ever come of this here's my phone number. I live in Rochester and I work at Labor Ready every day.'

Q do you remember Steve's last name

A I don't. I might of written it down in my book. I know I wrote down . . . his name and number in my book, but that's at the house. I don't have it with me right now

Q do you remember his phone number

A um um (no)

Q okay. How long ago did this happen

A two weeks, a month . . . long than that maybe, I've only been back in town for a short bit

Q okay, is this the same story that you told to the Detective earlier tonight

A no

Q okay, the only difference is that you

A put Michael in Steve's place

Q okay, but

A and finished off what happened instead of me just leaving

Q okay, but the story you told about what happened tonight was actually the incident that happened a couple weeks, maybe a month ago



A yes

Q okay. Did you tell Mike about what happened that day.

A yeah

Q how did he respond to that

A got very upset . . . he was hurt . . . I think that his friend had done that, had violated his trust and his respect and violated my trust and my respect . . . I think he felt violated just as much as I did

Q okay. How did you end up back over there today

A (pausing) we were out with the baby . . . playing in a park with the baby and drinkin' . . . and one way or another a conversation . . . however it lead up to it . . . we were talkin' about something or someone mentioned Kenny . . . Mike, he's like 'Yeah, that dude deserves a ass whoopin' . . . ya know . . . and . . . we decided to back to the apartment and drop the baby off . . . and um . . . come downtown and Mikie wanted me to show where Kenny was living where uh, where it was (inaudible)

Q okay. What time were you down here, what time were you down here earlier today? What time did you start this

A we had to, it had, it had to of been before 5:30 because we called the Capital Shuttle. The Capital Shuttle's free

Q okay, you said somebody mentioned Kenny's name in conversation

A it had to of been me or the friend of ours we were drinking with or Michael. Someone had mentioned his name . . . we all hang out with all the same people that know everyone else

Q okay

A it's a pretty tight click

Q and when you brought up Kenny's name did it get Michael upset

A yes . . . he got enraged. He was drunk. He wasn't like really drunk, he was just ya know . . . he was past tipsy

Q okay, who's suggestion was it then to go over and square things up

A (pausing) it was his suggestion and I have to admit that I agreed

Q is this the same apartment that you'd been to before

A yeah

Q had Mike ever been there before

A no, apparently not if he needed me to show him where it was

Q okay. What other places did you go look for him downtown

A (pausing) at his hangouts spots

Q can you tell me where you went



A we went to The Reef. We went to 4th Ave Tav. We went to B & R. He wasn't in any of those places so we figured that he was at home

Q okay, and when you didn't find him in any of those places you went to

A his home

Q and tell me what happened once you got to his home

A we knocked, I knocked on the door. Mikie was like 'That's not his apartment. That's this other guy's apartment.' I was like, 'No, this is his apartment.' He said, well, I guess it might be wrong and then I knocked on a different door . . . and um . . . but, Kenny answered the door said he wasn't receiving any company. Asked me if I was, he's like "Aren't you mad at me?" And I was like, "Yeah" and . . . he was . . . it was, and then we asked him about some . . . money that owed, owed us for a few years now. We knew we weren't gonna collect it but we still asked ya know, you gotta do that . . . and uh . . . we were all just standing there in the doorway . . . one thing lead to another, not very, didn't take

Q okay, you gotta speak up

A didn't take very long for everything to happen . . . and then we ran downstairs, down the street and I begged Michael to catch a bus with me. I said, "Let's just catch a bus. Let's get the fudge outta here.

Q when you say everything happened in the doorway, want do you mean by that

A (pausing) Kenny was stabbed

Q how did Kenny get stabbed

A with a knife

Q whose knife

A (pausing) maybe Michael's

Q what do you mean by maybe Michael's knife

A it could of been his knife. It could of been someone else's knife

Q did you see Michael stab *him*

A (pausing) yes, I saw Michael stab him

Q did you stab him

A I did not stab. him

Q how many times did Michael stab him

A I think three

Q okay, when you say you think, what do you mean by that

A it means I shut my eyes and I didn't really watch. I was like in shock and I think three

Q what did Michael say to him when he stabbed him

A I think he called him a punk. . . . I heard the words mother fucker. . . . I don't quite remember what was said after that

Q what else

A (pausing) well, when we were walking and the cops came and yelled for Michael and I to get on the floor



and. . . . (inaudible) I was like, "It's wet." . . . (inaudible) . . . and I've been here ever since. They just took my clothes

Q okay, I need, I need you to speak up a little bit for me

A that's it. That's it um . . . we saw Kenny fall down, heard him grunt. We ran like the wind as far as we could. Not as far as we could but as fast as we could . . . try and debate what to do next. I don't think it was all planned out what was all gonna happen or else, I think we would of talked about what we were gonna do after the fact. So I think that as far as that goes he was gonna go over there and kick his \ass. . . . I think those were the actual intentions, but since Kenny was being a punk . . . I think it just made Michael more angry

Q was Michael mad

A infuriated

Q you said infuriated

A yes, he was angry

Q have you ever seen him that mad

A yeah, I've been with him for years. I've seen all sides of him

Q was he in control of himself

A (pausing) I can't answer that with any. . . . explain more on what you think out of control (inaudible)

Q would you describe, describe him as being out of control

A (pausing) no, Mike has, I don't know but he's . . . no . . . I wouldn't describe him as being (inaudible) out of control

Q the first time that Mike stabbed Kenny, did you see where he stabbed him at

A (pausing) I think it was the stomach . . . I didn't, it was like that. It wasn't like that

Q okay, the, the, hang on a minute. The tape recorder's not gonna be able to see what you're doing so you're describing his holding, his holding the knife in his hand and like punching him in the stomach with it (describing fist, thumb up, knife extending from fist toward victim)

A yes

Q pardon

A yes

Q okay. Did you see how many times he stabbed him after that or you're just guessing that it was two more times

A just guessing

Q okay

A Mikie had asked me after we were walking, he was like, "Did you see how many times I stabbed him?" I said, "I don't know, I think you did it about three times." He's like "Three?" and I was like, "Yeah, I think so." He's like, "Do you know where this came from?" He was asking me about the cut on his hand. I was like, "Dude, I have no clue what that came from. How come you don't know?"



Q did he cut himself in the process of stabbing this guy

A that's what I'm thinkin', but I'm not sure

Q did Kenny do anything to fight back from this assault

A (pausing) I know he reached into his pocket . . . or somethin' . . . I don't know what

Q after he was stabbed

A he saw Michael coming up. He lifted his hand . . . his chest open, he might of went to go strike his hand out or something and then (inaudible)

Q okay, you, you gotta speak up

A okay, he lifted his hand over his head maybe to strike Michael's hand down or something and then he put his hands in his . . . put his right hand in his right pocket . . . took a step back. . . . Michael proceeded to stab him . . . then his hands were like . . . how do you explain this . . . open arms . . . with his hands open and he fell down . . . and we ran (describing subject holding hands open, palms toward assailant)

Q okay, when he's standing there with his open hands you're talking about Kenny, correct

A yeah after, after the fact, yes

Q did you see anything in his hands at that point

A (pausing) um um (no)

Q okay. I asked you earlier if . . .

A I think he took a step back in his doorway tryin' to get back into his house, into his apartment

Q okay, was there anybody else there with you when this happened

A um um (no). There might of been someone inside his apartment that's why he might of not been accepting company. I don't know. We didn't see inside of his apartment

Q okay, you said there might of been somebody that's why he wasn't accepting company. When, when you knocked on the door did he answer the door right away or did he say inside he wasn't accepting company

A oh no, he answered the door. He didn't say till he um, till he realized who was there. Like I said, ever since Kenny saw me from that night forward he's been hiding from me. He's like seen me and then he goes and runs . . . goes and run, goes and run and goes and runs

Q okay, so he saw you and Michael

A yeah. In between all of this from the time it happened at his apartment . . . to, to tonight, I've seen Kenny like 4 or 5, maybe 6 times and every single time and every single time I saw him he would run and hide from me, which I quite don't understand and I would kinda like go the opposite direction from which way I was comin' and try to avoid him. He opened the door, he saw Mikie and me . . . and then he was like, 'Well, ya know, I'm definitely not accepting any company," And we're like, 'Well, do you have any of that money that you owe us?" ya know, cuz it's like 300 bucks and he's like 'No, I don't have any of the money.' 'You owe us' and then we're like talking about ya know, how, 'How you doing? How you doing?' Ya



know, back and forth and then. . . . when further in the conversation anyway. . . . and that. . . . was when it happened

Q you said that's when it happened

A (pausing) I don't quite remember what part of the conversation, I remember there was a dead stand still and nobody talking for like a couple seconds and then it happened. I don't quite remember exactly what was said previous. I remember him asking me 'if you were mad at me' and I remember me telling him I was. I remember . . . talking about other things. . . . vaguely

Q okay. Are you sure that you didn't stab him

A I'm positive I did not stab him

Q okay. Sylvia, is there anything else that you can think of that you wanna make known at this point

A that . . . I feel it was justified what happened . . . I feel that Mikie being my husband had a right to get hurt over the fact that his friend had tried to do that to me. I feel that . . . me not telling Michael about it would of been violating . . . a confidence and a trust in our marriage and our relationship, and I feel that that's really important to me. Michael's my best friend and I'm his . . . ya know, any . . . there isn't anything . . .

Q is your husband a racist

A no, his [sic] not a racist

Q describe his relationship with minorities

A I'm a hundred percent Mexican. His child is half Mexican

Q okay. Has he ever possessed any white supremist literature

A I think someone gave him a magazine and he brought it home

Q okay, but he doesn't now ordinarily practice that then

A no, gosh no, no, no Mikie's one of the most fair people you'll ever meet

Q okay, anything else that you want to add at this point

A (pausing) um um (no)

Q are you being completely truthful with me . . . this time

A I wanna add that the last time I was afraid and I told what had happened. I just took both the stories and coincided them . . . and tonight I just took or this time I'm just taking tonight's story

Q okay, you were afraid when Detective Gies talked to you and then what you ended up doing was replacing your husband and put him into the uh, story with the first assault that happened with Kenny and you, correct

A yes

Q okay. The information you gave me right now on this statement though is what actually took place

A yes

Q okay. Detective Holmes, anything else



HOLMES nothing

COSTA Sylvia, were there any uh, threats or promises been made to you to get you to make this statement

A no

Q pardon

A no

Q okay. Today's date is still the 5th of August, 1999. The time is 2309.

Transcribed:
JDC:jp

**TRIAL EXHIBIT NO. 44**

SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

[Caption Omitted In Printing]

**Case Number 99-6530**
**Detective Sergeant Jim Costa/Detective Russ Gies – 2nd Statement of Michael Crawford**

---

This will be a statement. It's concerning case number 99-6530. This will be the statement of Michael Crawford. Today's date is the 6th of August, 1999. The time is 45 minutes past midnight. This statement is being recorded at the Olympia Police Department. Also present is Detective Russ Gies.

Q Mike, do you understand this statement is being recorded and is this with your consent

A yes

Q would you give me your full name again and spell it please

A Michael Crawford – M I C H A E L – C R A W F O R D

Q and your address

A 1919 Evergreen Park Drive

Q do you have a phone number there

A um, yes, 352-2476

Q okay, and uh, are you working

A no

Q okay, how about your date of birth



A 11/22/77

Q okay

GIES what's your apartment number

A 108

COSTA okay Mike, I'm gonna go through and I'm gonna read a warning and a waiver of your constitutional rights. I know that these were read to you before, but I'm gonna go back through it again. It says: You have the right to remain silent. Anything you say can be used against you in a court of law. You're not under the age of 18, correct

A correct

Q okay. You have the right at this time to an attorney of your own choosing and have him or her present before and during any questioning or the making of any statements. If you cannot afford an attorney you are entitled to have one appointed for you by a court without cost to you and have him or her present before and during questioning or the making of any statements. You have the right to exercise any of the above rights at anytime before or during questioning or the making of any statements. Do you understand each of those rights as I've explained then [sic] to you

A yes

Q okay, do you have any questions about any of them

A (pausing) um, no

Q okay. On the bottom again, another statement, it says: I have read or have had read to me the above

explanation of my constitutional rights and I understand them. It says, I've decided not to exercise these rights at this time. It says, any attached signed statements are made freely, voluntarily without threats or promises of any kind. Since we're obviously not doing any kind of a signed statement, and we're doing it by uh, tape recording again, is this with your consent and uh, it is freely, voluntarily and being done without any threats or promises

A yes

Q okay. We came and got you about 5 minutes ago, correct

A yes

Q and I told you that um, obviously I sat through an interview that you did with Detective Gies earlier and I also um, had some idea as to a conversation that he had with your wife. You two were involved in an incident that took place earlier tonight where a subject was stabbed, is that correct

A yes

Q okay, and I told you just a little while ago that there was obviously some inconsistencies in the statement that you gave us and the statement your wife gave us and uh, she clarified some of the uh, facts. I told you that some of the things you told us was truthful and then some other things you told us weren't truthful, is that correct

A yes

Q and I told you at this point what I would like to do is to hear from you exactly what took place this evening



. . . in the area of the truth and not the inconsistencies that we got earlier, is that correct

A yes

Q okay. What you told the Detective earlier tonight when you talked to him is not the whole truth about what happened, is that correct

A yes

Q okay. Let's take this thing back from the uh, start of earlier tonight and where, where were you guys at before you ended up over at Kenny's house

A downtown

Q okay, you were downtown with your wife and child

A no, my child wasn't with me downtown

Q okay, were you guys at a park earlier today

A yeah, we were over at um . . . my friend's house and he had a um, playground and shit

Q okay, what, tell me about the conversation you had. Tell me how you got on the topic of Kenny or how he came up, his name came up

A I talked to him about him trying to rape her

Q okay, when did this attempted rape occur

A um . . . while we were broken up and she was comin' up back here to try to get back with me

Q okay, do you remember how long ago that was

A no, I don't

Q okay, was it a week ago, two weeks ago, three weeks ago, longer

A it was longer than three weeks ago. It was like a month, month or two ago

Q okay, and you, you and your wife were split up at that point

A yeah

Q okay, and she told you something happened between her and Kenny

A yes

Q okay, tell me about the story. Tell me what she told you happened

A well, first she thought that I'd got, got Kenny to try to rape her or somethin' and, and I was like, no way, ya know, ya know, I'll kick his ass, somethin' ya know, I just . . . I, I didn't, I couldn't understand why she'd think somethin' like that ya know, and she said that he told her that and was yelling stuff about me like I told him to do it . . . and so, and I haven't seen him in all this time till up to today

Q okay, so sometime ago your wife told you that when you were separated that he did or he made an attempt at raping her and you were upset with him about that

A yes

Q okay. What happened today that led up to this incident that you had with him? Where were you guys at when his name first got mentioned



A we were at my friend's house

Q okay, who, who is your friend

A Chris's

Q Chris

A Martin

Q Chris Martin. Where does Chris live

A in some apartments next to the apartments that we lived in

Q okay, and you were over there this afternoon about what time

A I don't know

Q okay, and then how did Kenny's name come up

A I don't remember

Q okay, when his name came up in conversation what did that do for you

A it made me mad, mad

Q okay, how mad

A like mad enough to go find him

Q okay, is that what you guys did at that point

A yes

Q what, what did you do with your child

A we dropped him off at Ray and Brandy's house

Q at Ray and Brandy

A where I live

Q okay, friends of yours

A yeah

Q okay, and then who took off to go find Kenny

A we both did

Q okay, you have to tell me who we both, who do you mean

A me and Sylvia

Q okay, do you remember about what time you started to look for him

A no

Q okay, at the point you started to go out and look for him, did you intend to stab him at that point

A no

Q you were just gonna go find him and do what

A just, I don't know, I just wanted to confront him on it and I don't know, take it from there

Q okay. You, you said earlier you were mad enough to kick his ass

A yeah

Q okay, is that what you were gonna do? Is that what you intended to do

A (pausing) I wasn't sure



Q okay, but you were upset about what had taken place before involving your wife, correct

A yes

Q okay, where, where did you go to find him

A huh?

Q where did you go to find him

A to where she, the apartment she said it happened at

Q okay, had you ever been to that apartment before

A not, not when he lived there

Q okay, so you didn't know where he lived

A no

Q okay, is that why you took your wife with you

A yeah

Q okay

A and I wanted to confirm stories and everything

Q okay, before you went to the apartment where did you go look for him then

A (pausing) um . . . we stopped in a couple bars

Q do you remember the bars

A uh . . . I know The Reef was one of 'em

Q okay, do you remember any of the other ones

A uh, 4th Ave I think . . . is the name of it

Q 4th Avenue Tavern

A yeah

Q okay, anything else

A Uh, B & R

Q what's, now what's B & R

A Bread and Roses

Q Bread and Roses. Are these places he normally hangs out at

A uh . . . yeah, I guess

Q okay, and you didn't find him there

A no

Q do you remember if you talked to anybody or saw anybody at these places

A no

Q did you ask anybody when you went in there if they knew Kenny or knew where he was at

A I don't remember

Q okay, when you didn't find him at those places then where did you go

A um, to the apartments

Q okay, tell me what happened once you got to the apartment

A um, we went up and knocked on the wrong door and he ended up comin' out into the hallway



Q okay, is there two doors at the top of the stairs

A there was three. There's, there's one . . . that's like . . . the top of the stairs is like this and there's a door here and a door here, and a door here . . . and we came and we knocked on this door . . . and then he came out of this door.

Q okay. When he came out of the door, what did you guys say to each other

A well, at first I asked him about the money that he had owed us ya know, he had owed us for a few years. It's kinda not really a big deal anymore. I've kinda wrote it off ya know, but um . . . I didn't even have to ask him what happened with Sylvia cuz he, he already started askin' her if she was mad at him and stuff . . . and that told me right there that there was some truth to what she was sayin' and shit and ya know, then I, I, I started in at him fuckin' ya know, sayin' 'What the fuck dude? What'd you do?' ya know, and he started gettin' a attitude and fuckin' one thing lead [sic] to another and fuckin' we got into a altercation and I stabbed him

Q okay, tell me what was going, tell me what was going through your mind when he, when he uh, started arguing with you at that point

A well

Q tell me what you were feeling

A I was feeling angry and fuckin' . . . scared and . . . just . . . the whole combination. Just adrenalin goin' through me and. . . .

Q where, where was uh, Sylvia when you first stabbed him

A um. . . . I'm not sure, somewhere close

Q okay. I'm, I'm gonna ask you a question now, and I'm not doing it to offend you or anything, but is there any chance at all that Sylvia stabbed him

A (pausing) I wouldn't say that

Q okay, what do you mean you wouldn't say that

A even if she did, I wouldn't say I'm just being honest

Q well, I, I understand that she was upset with him. . . . you're telling me that you stabbed him, right

A (pausing) I believe so

Q okay, what do you mean by you believe so

A (no audible response)

GIES be honest with us Mike

A (no audible response)

Q come on

A (long pause) I don't know if I can do this

COSTA well, I know it's tough, but again, it has to do with the truth, and you're . . .

A (sighing)

Q I have my idea as to how I think it happened, and I guess what I'm saying to you is, is that are you, are you willing to take the blame for something that maybe you didn't do

A (no audible response)



GIES help us out Michael, tell us the truth

A (no audible response)

COSTA how did Kenny get stabbed

A (pausing) when we all started fightin' and he got stabbed

Q okay, what do you mean we all started fighting

A well, it was . . . she was right there in the mix of it all, it was really dark in there

Q who had the knife

A (pausing) I had the knife

Q what hand was your knife in

A I don't remember

Q you don't remember if it was in your left hand, your right hand

A no

Q how many times did you stab him

A I don't know

Q you don't remember

A um um (no)

Q do you remember the first time you stabbed him

A (pausing) it was really dark

Q okay, but you don't need to see no matter how dark it is to know how many times you stabbed him. Do you know what I'm saying? And we've already gone over the

hump with the truth of the incident of why you went over there in the first place and it had to do because this guy had done something to your wife and you were upset with him. You told us you were aggravated. You didn't deny that. You didn't uh, when you first sat down with the Detective, you didn't deny that you were mad. You turned around and told him that you were enraged, and that's understandable. I guess at this point is, is that I'm, I'm just looking for the truth as to what happened. I mean, you're not arguing that you didn't stab this guy, you're not arguing that you were upset, but we've got some minute details that aren't clear and that's what I'm asking you

A where did you come up with that she stabbed him? . . . can I have some more water, please

GIES sure

COSTA that's what I'm asking you

A (pausing) I didn't see her stab anybody

Q okay. How did you cut your hand

A I honest to god don't really know the truth to that question

GIES did you grab Kenny, maybe grabbed on this shirt and onto his body

A probably

Q during the confrontation

A probably

COSTA okay, Mike, let me, let, let me ask you a question. I know why you went over there now um, what did uh, what did Kenny do after he was stabbed



A he started, just kept fightin'

Q okay. Did you ever see anything in his hands

A I think so, but I'm not positive

Q okay, when you think so, what do you mean by that

A I could a swore I seen him goin' for somethin' before, right before everything happened. He was like reachin', fiddlin' around down here and stuff . . . and I just . . . I don't know, I think, this is just a possibility, but I think, I think that he pulled somethin' out and I grabbed for it and that's how I got cut . . . but I'm not positive. I, I my mind goes blank when things like this happen. I mean, I just, I remember things wrong, I remember things that just doesn't, don't make sense to me later

Q okay

A I don't know why

Q okay. Let me ask you a question then going back over the details tonight. Are you clear about why you guys went over there

A yeah

Q you're clear about the details up to that

A yeah

Q the stops you made at the other bars and the taverns looking for him

A yeah

Q okay

GIES why Sylvia, do you think, is as upset as you when you guys walked over there

A (pausing) yeah

Q did she express her anger or attitude that we're gonna go kick his butt

A (pausing) I don't remember

Q but she was upset

A she was upset

Q she certainly knew that you were going over there with the intention of making things right

A yeah

Q be honest with you Michael, with us . . . did, did she have possession of the knife? Please be honest

A (pausing) I don't know

Q could she of had possession of the knife

A she could of

Q and how would she have gotten possession of the knife

A (pausing) I don't know

Q I mean, I'm trying to figure out a scenario of her pulling it out of your sheath or it would make more sense if, I guess, if you handed it to her before knocking on the door or something of that nature

A I wouldn't, I wouldn't hand her the knife

Q you would not



A I would not hand her the knife

Q okay, did she take it out of your sheath Michael

A I could see her doing that if I would if I would of got into a altercation

Q do you recall taking the knife out of your sheath

A I don't remember takin' the knife out of my sheath

Q okay. Do you recall one of the three stab wounds being made by her or two of the three or three of the three? Be honest

A I don't, I don't recall

COSTA okay. Mike, is there any uh, not to prolong this, is there any doubt in your mind about the things we've talked about earlier, about how you ended up over there

A about how we ended up over there?

Q right

A (no audible response)

Q is that clear

A it's not real clear. I know that we stopped and looked in some bars and that we stopped and looked in B & R

Q okay, and you're clear about that

A yeah, I'm clear about that

Q okay, and you're clear about being angry and going over there to try to . . . even up the situation with what he did to your wife from a prior incident

A yeah um, part of it, I wasn't sure if I believed it or not, I needed, I needed hear, hear from him ya know . . . I needed to see what he said

Q okay, and once you heard what he said

A oh, I started talkin' shit and he started talkin' shit, and . . . we got in a fight

Q and then he got stabbed

A yeah

Q okay

GIES Mike, do you carry that knife pretty much all the time

A sometimes I do, sometimes I don't

Q how long have you carried it on and off

A um, a few months

Q why

A protection

Q are you familiar with it? I mean, you're, you carry it on and off, you're familiar with how to grab it and use it

A well, I've never had to use it in a situation before

A well, I just . . . um, actually she bought that knife for me down in Portland . . . it's just the only knife I've had

Q okay

COSTA Mike, anything else you think you need to add to this statement at this point

A (pausing) um . . . (long pause) ___ . . . no



GIES Mike, be honest with us please. Did she use the knife too

A (pausing) did she use the knife too? . . . I, I really don't think so

COSTA okay, anything else Mike

A huh?

Q anything else you need to add to this statement

A (pausing) um. . . . no

GIES let me ask one more question Detective. Do you specifically recall stabbing him the three times

A I don't, I, actually I blacked out through the whole thing

Q do you specifically recall the first time though

A I really, actually, I don't. I had asked, I had asked the nurse in the hospital is how I really found out. I asked the nurse. I go, 'Did I, did I get him?' . . . and she said, 'Yeah, you got him.'

Q okay

COSTA okay, this will uh, conclude the statement. Today's date is still the 6th of August, 1999. The time is 1:07

GIES be turning off the tape at this time.

Transcribed:
JDC/REG:jp

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***Office of the Clerk***
***Supreme Court of the United States***
***Washington, D.C. 20543-0001***

June 9, 2003

Bruce E.H. Johnson
Davis Wright Tremaine LLP
2600 Century Sq.
1501 Fourth Ave.
Seattle, WA 98101-1688

**Re: *02-9410 – Crawford v. Washington***

Dear Mr. Johnson:

The Court today entered the following order in the above case:

> "The motion of petitioner for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted."

* * *

Sincerely,

WILLIAM K. SUTER, CLERK

/s/ Denise J. McNerney
Denise J. McNerney
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Phone: 202-479-3032/
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Enclosures

Supreme Court, U.S.
FILED
JUL 24 2003
OFFICE OF THE

No. 02-9410

IN THE
# Supreme Court of the United States

MICHAEL D. CRAWFORD
*Petitioner,*

v.

WASHINGTON,
*Respondent.*

On Writ of Certiorari
to the Supreme Court of Washington

## BRIEF FOR PETITIONER

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## QUESTIONS PRESENTED

I. Whether the Confrontation Clause of the Sixth Amendment permits the admission against a criminal defendant of a custodial statement by a potential accomplice on the ground that parts of the statement "interlock" with the defendant's custodial statement.

II. Whether this Court should reevaluate the Confrontation Clause framework established in *Ohio v. Roberts*, 448 U.S. 56 (1980), and hold that the Clause unequivocally prohibits the admission of out-of-court statements insofar as they are contained in "testimonial" materials, such as tape-recorded custodial statements.

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## BRIEF FOR PETITIONER

### OPINIONS BELOW

The opinion of the Washington Supreme Court (J.A. 2-19) is published at 147 Wn.2d 424, 54 P.3d 656 (Wash. 2002). The opinion of the Washington Court of Appeals (J.A. 20-37) was unpublished. The relevant order of the Superior Court (J.A. 38-77) is unpublished.

### JURISDICTION

The Washington Supreme Court issued its decision in this case on September 26, 2002, and denied Petitioner's timely petition for rehearing on December 12, 2002 (J.A. 78). This Court has jurisdiction under 28 U.S.C. § 1257(a).

### CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

### STATEMENT OF THE CASE

This case presents this Court with an opportunity to clarify the operation of the Confrontation Clause and to refasten this critical provision of criminal procedure to its historical and textual underpinnings. At issue is whether the court in Petitioner's criminal trial erred in allowing the State to introduce a tape recording and accompanying transcript of the police's custodial examination of his potential accomplice, who was unavailable to testify at trial. During the examination, the suspected accomplice denied any significant involvement in the alleged felony and directly implicated Petitioner in the incident. The Washington Court of Appeals held that the admission of this custodial statement violated the Confrontation Clause because several circumstances surrounding its making indicated that it was unreliable. But the Washington Supreme Court reversed, ruling that the potential accomplice's statement was sufficiently reliable for confrontation purposes, irrespective of the circumstances surrounding its making, because its content "interlocked" with

Petitioner's own custodial statement. This "interlocking" rationale requires this Court to evaluate the nature and propriety of the reliability-based approach that has framed its recent applications of the Confrontation Clause.

1. On August 5, 1999, Petitioner Michael D. Crawford and his wife Sylvia went to the apartment of Kenneth Lee. An argument developed and a violent altercation suddenly followed. During the scuffle, Petitioner received a cut on his hand that required twelve stitches to close, Sylvia got blood on her sweater, and Petitioner stabbed Lee in the stomach, seriously injuring him.

That night, the police arrested Petitioner and Sylvia and interrogated them in separate rooms at the Olympia Police Department. At two different points of each person's interrogation, the police tape recorded what the State calls "statements" from the suspects. In each of these "statements," the Crawfords provide a series of responses to police officers' specific questions, much as a party would at a deposition. During his first statement, Petitioner waived his *Miranda* rights and said that he and Sylvia had run into Lee earlier in the day in downtown Olympia and that Lee had told them that they could come over to his apartment later to collect some money that he owed them. Petitioner told the police that after they arrived at the apartment, he left to go to the store. He said that he returned to the apartment to find Lee making sexual advances toward Sylvia. A tussle suddenly resulted during which Lee reached for something, Petitioner's hand got sliced open, and Petitioner stabbed Lee. J.A. 113-19.

At the outset of Sylvia's first interrogation, the officer also read Sylvia her *Miranda* rights. She asked whether she would be "let go until there was a lawyer present" if she invoked her right to counsel. J.A. 80. The officer responded that while a lawyer could be appointed to represent her, "I don't know if you'll be let go or detained more at this point or not. It depends on how the investigation continues. Ok, so I can't answer if you'll be detained longer or not. At this point this is under investigation and that's where we're at, at this point."



J.A. 81. Sylvia then waived her rights. Once questioning began, Sylvia's responses were similar to Petitioner's, but she said that Lee invited Petitioner and her over to his house "to go drinking." J.A. 86. She also acknowledged that she had been "pretty intoxicated" during the day. J.A. 88. Finally, she said that she was behind a wall during the stabbing and, therefore, did not see what happened. J.A. 93.

A few hours later, from about 11:00 pm until 1:00 am, Petitioner and Sylvia each responded to additional police questioning on tape. Both said that they went to Lee's apartment to demand that he pay up on a debt, and (in a change from their first statements) that Lee had actually sexually assaulted Sylvia several weeks ago, not earlier that day. The second statements, however, differed from each other somewhat concerning the actual stabbing. When the interrogating officer asked Petitioner, "Did you ever see anything in [Lee's] hands?," Petitioner responded that "I coulda swore I seen him goin' for somethin' before, right before everything happened. . . . I think that he pulled somethin' out and I grabbed for it and that's how I got cut . . . but I'm not positive." J.A. 155 (second ellipsis in original).

When the officer asked Sylvia, "did [Lee] do anything to fight back from this assault?," the following colloquy took place, as transcribed by the Police Department:

> A: (pausing) I know he reached into his pocket . . . or somethin' . . . I don't know what
> Q: after he was stabbed
> A: he saw Michael coming up. He lifted his hand . . . his chest open, he might have went to go strike his hand out or something and then (inaudible)
> Q: okay, you, you gotta speak up
> A: okay, he lifted his hand over his head maybe to strike Michael's hand down or something and then he put his hands in his . . . put his right hand in his right pocket . . . took a step back . . . Michael proceeded to stab him . . . then his hands were like . . . how do you explain this . . . open arms . . . with his hands open as

> he fell down . . . and we ran (describing subject holding hands open, palms toward assailant)
> Q: okay, when he's standing there with his open hands you're talking about [Lee], correct
> A: yeah, after, after the fact, yes
> Q: did you see anything in his hands at that point
> A: (pausing) um um (no)

J.A. 137 (ellipses and parentheticals in original). Sylvia also told the officers that Petitioner had been "infuriated," "enraged," and "past tipsy," and she stated that Petitioner had said before the incident that Lee "deserves an ass whoopin'." J.A. 131-32, 135. Near the end of her examination, Sylvia denied any involvement in the actual stabbing. "I did not stab [Lee]," she said, "I saw Michael stab him." J.A. 139, 134. She quickly added, though, that during the scuffle, "I shut my eyes and I didn't really watch. I was like in shock." J.A. 134.

2. The State filed an information against Petitioner charging him with attempted murder in the first degree with a deadly weapon and assault in the first degree with a deadly weapon. Sylvia was a "potential accomplice" because, even according to her own admissions, she "showed [Petitioner] where to find Lee[,] was present through the duration of the violent encounter, . . . walked away from the stabbing with [Petitioner] and did not turn to the police when she had the opportunity." J.A. 14. The State nevertheless declined to charge her at that time with any crime.

The key issue at Petitioner's trial was whether he acted in self-defense. Petitioner took the stand and testified that after asking Lee whether he had tried to rape Sylvia, Lee rushed at him. Petitioner thought that Lee had a weapon. So, in Petitioner's words, "I thought that I was going to get stabbed, and I just pulled my knife and figured I better get him first." Report of Proceedings at 276. A forensic scientist testified that he could not determine whether Lee was moving forward or backward when he got stabbed, but that it appeared that Crawford had been in a blocking motion (a defensive posture) during the altercation.



Sylvia did not testify. Rather, the State and Petitioner stipulated that Washington's marital privilege statute rendered her unavailable to do so because she and Petitioner wanted to invoke the privilege. J.A. 25, 39-43.[1] The State, however, sought to offer its tape recording and accompanying transcript of Sylvia's second custodial statement as evidence that Lee did not reach for a weapon until after Petitioner stabbed him. Petitioner objected that this admitting this material would violate the Confrontation Clause. J.A. 41-42. The State acknowledged that the Clause was applicable under these circumstances but contended that Sylvia's statement was reliable enough to be admissible. J.A. 44-46.

The trial court, after discussing this Court's plurality decision in *Lilly v. Virginia,* 527 U.S. 116 (1999) – which elaborates on the reliability-based Confrontation Clause framework established in *Ohio v. Roberts,* 448 U.S. 56 (1980) – sided with the State and held that the statement was admissible. The court stated that, in light of other evidence in the case, Sylvia's statement did not appear to "shift blame, exculpate herself and inculpate [Petitioner]." J.A. 61. The court further reasoned:

> So when I take the statement of Sylvia Crawford in the context of the statement of Defendant Crawford, I do not find that it is unreliable and untrustworthy. It's not dissimilar to the defendant's own statement. When I take it in a vacuum, not measured against any other evidence known at the time or understood at the time, I think it's a closer call. . . .
>
> . . . I am concluding, given my analysis of the statements and the standard set forth in *Lilly vs. Virginia,* that the type of potential accomplice statement against penal interest made by Sylvia

[1] The martial privilege statute was not the only law standing in the way of Sylvia testifying. Even if Petitioner had tried to force Sylvia to testify, she still could have invoked her Fifth Amendment right to remain silent to avoid taking the witness stand. At the time of Petitioner's trial, the State was considering filing charges against Sylvia for her role in the assault, and it did so shortly after Petitioner's trial concluded.

> Crawford is sufficiently reliable concerning what occurred at the time of the stabbing and with respect to who stabbed Mr. Lee that I would not preclude the State from attempting to admit it in its case in chief.

J.A. 61-62.

Later in the proceedings, the State played the tape of Sylvia's statement and introduced the accompanying transcript. And at closing argument, the prosecution stated that "[t]he defendant's own wife gives damning evidence in this case. . . . She describes an intentional stabbing of Mr. Lee and completely refutes [Petitioner's] claim of self-defense." Report of Proceedings at 468.

The jury found Petitioner not guilty of the attempted murder charge but guilty of the assault charge. On November 19, 1999, the court sentenced him to 174 months in prison.

On November 24, 1999, the State filed (and later amended) an information against Sylvia for her role in the incident, charging her with rendering criminal assistance in the first degree and assault in the second degree. Brief in Opp. at 1. Sylvia pleaded guilty on January 18, 2000 to the criminal assistance charge and to assault in the third degree. *Id.* She was sentenced to nine months in county jail. *Id.* App. F at 5.

3. On appeal, the Washington Court of Appeals reversed Petitioner's conviction on the ground that the admission of Sylvia's second statement violated the Confrontation Clause. It began by noting that this Court's *Roberts* framework permits the introduction of hearsay evidence against criminal defendants if it "(1) falls within a firmly rooted hearsay exception or (2) contains 'particularized guarantees of trustworthiness.'" J.A. 23 (quoting *Roberts*, 448 U.S. at 66). It also stated that although "parts of Sylvia's second statement," the only one offered for the truth of the matter asserted, "were against her penal interest" (and thus admissible under state hearsay law) because they "could give rise to accomplice liability" J.A. 26, the against-penal-interest exception to the hearsay rule is not a "firmly rooted" one. J.A. 24.



The court of appeals then applied a nine-part test "to determine whether an out-of-court statement satisfies the reliability prong" of the *Roberts* framework and held that Sylvia's second statement was "plainly untrustworthy," J.A. 33, because: Sylvia had a motive to lie; Sylvia gave two different versions of her statement within four hours; Sylvia's statement was not spontaneous, but rather was given under mandatory police questioning; the statement described past events; and "cross-examination could reveal that she lacked knowledge of what happened" because "Sylvia stated that she shut her eyes during the stabbing." J.A. 28-31. The court of appeals added that although the Washington Supreme Court had previously held that an accomplice's confession could be deemed reliable if it "interlocks" with the defendant's confession, "that reasoning does not apply in this case" because Petitioner's and Sylvia's statements "differ regarding whether Lee was armed when [Petitioner] stabbed him." J.A. 31-32.

The court of appeals next held that state evidence law barred the admission of Sylvia's first statement because, as evidence of supposed fabrication, "it is relevant only if the second statement is admitted." J.A. 25, 33. Lastly, the court of appeals concluded that the admission of Sylvia's statements was not harmless because "Sylvia's second statement refutes [Petitioner's] claim of self-defense" and sends the "overwhelming message that the jury cannot trust [Petitioner's story]." J.A. 33-34.

Chief Judge Armstrong dissented. He agreed with the majority that the portions of Sylvia's statement describing Petitioner's mental state and his feelings toward Lee were not against her penal interest, but he asserted that this was harmless error. J.A. 35 & n.3. The dissent then argued that the portion of Sylvia's statement regarding the stabbing was admissible under both hearsay law and the Confrontation Clause because it interlocks with Petitioner's statements. In the dissent's view, "even if we read Sylvia's statement as reporting that Lee reached for something after the stabbing, the statements are still the same in one essential fact: neither [Petitioner] nor

Sylvia clearly stated that Lee had a weapon in hand from which [Petitioner] was simply defending himself. And it is this omission by both that interlocks the statements and makes Sylvia's statement reliable." J.A. 36-37.

4. The Washington Supreme Court granted the State's petition for discretionary review, reversed and reinstated Petition's conviction. The Court initially confirmed that Sylvia was unavailable to testify as a matter of state law due to the invocation of the state marital privilege statute but that her custodial statement was admissible if it satisfied state rules of evidence and federal confrontation standards. It then held that Sylvia's whole second custodial statement – including the portions saying that Petitioner, not her, had stabbed Lee and saying that Petitioner had been "infuriated" and had stated that Lee "deserves an ass whoopin'" – was against her penal interest and thus admissible under state hearsay law. J.A. 14-15.

Turning to the Confrontation Clause, the Court adopted the reasoning from the dissent below, holding the "admission of Sylvia's statement satisfies the requirement of reliability under the confrontation clause" because "both of the Crawfords' statements are ambiguous as to whether Lee ever actually possessed a weapon." J.A. 18. The Court deemed it irrelevant whether the circumstances surrounding Sylvia's statement also indicated that it was trustworthy. "[A]n interlocking confession," the Court explained, "serve[s] the same purpose as the nine-factor test in assessing reliability." J.A. 16.

5. Petitioner moved for rehearing, but the Washington Supreme Court denied this motion without comment. J.A. 78.

6. This Court granted certiorari. 123 S. Ct. 2275 (2003).

## SUMMARY OF ARGUMENT

The Washington Supreme Court erred in holding that the Confrontation Clause permitted the State to introduce Sylvia's custodial examination against Petitioner.

I. The Confrontation Clause prohibits the government from introducing any *ex parte* "testimonial" statements, such as an accomplice's custodial examinations, against the accused.



A. The common law right to confrontation, which the Framers incorporated into Confrontation Clause, solidified in response to the notorious English prosecutions of Sir Walter Raleigh and others on the basis of incriminating *ex parte* depositions and accomplice confessions. Such *ex parte* testimony, scholars such as Hale and Blackstone observed, tended to produce incomplete, slanted, misleading, and even inaccurate statements. The resulting likelihood that defendants might be convicted on this type of faulty evidence was deemed unacceptable. Accordingly, the rule of confrontation required that all incriminating testimony be given face-to-face and subject to cross-examination. If an accomplice confessed and became unavailable for trial, it was settled that the confession "cannot be made use of as evidence against any others whom on his examination he confessed to be in the [crime]." *Case of Thomas Tong,* Kelyng J., 17, 18, 84 Eng. Rep. 1061-62 (1662).

American courts consistently have adhered to this traditional rule. Chief Justice Marshall described the Confrontation Clause, consistent with other early American decisions, as commanding that "where A., B., and C. are indicted for murdering D., . . . the declarations of one of the parties made in the absence of the others have never been admitted as evidence against the others." *United States v. Burr,* 25 F. Cas. 187, 194 (C.C. Va. 1807) (No. 14,694). This Court, in turn, has found the Clause violated each time it has addressed a case in which a nontestifying accomplice's custodial confession was admitted against the accused. Indeed, just as at common law, the landscape of this Court's jurisprudence dictates that the government may not convict a defendant through any testimonial statements – that is, statements given in connection with its investigation or prosecution – that have not been (or cannot be) subjected to cross-examination.

B. Applying the testimonial standard to the facts of this case yields a straightforward result: Petitioner's confrontation rights were violated because the State introduced a nontestifying accomplice's custodial examination implicating him in the charged offense. This bright-line rule forbidding the

introduction of such statements renders irrelevant the Washington Supreme Court's conclusion that Sylvia's custodial examination was "reliable" because it "interlocked" with Petitioner's custodial statement. The right to confrontation is a categorical requirement that the government prove its case through live testimony that is subject to cross-examination, and the State did not do so here.

C. To the extent that the framework established in *Ohio v. Roberts,* 448 U.S. 56 (1980) – which suggests that testimonial statements that have not been subjected to cross-examination are admissible if courts deem them reliable – dictates a contrary result, that framework should be abandoned. The framework contravenes the history, purpose, text, and structure of the Confrontation Clause – each of which conceptualizes confrontation as a procedural rule to be enforced even when adverse *ex parte* testimony appears trustworthy. The Clause is not intended, as *Roberts* would have it, to be a case-by-case measuring stick supervising the reliability of all incriminating hearsay evidence.

The *Roberts* framework also falters in practice. It breeds inconsistent and confusing results in an area in which certainty and predictability are vital. And it allows courts to invoke reasoning strikingly reminiscent of Raleigh's judges in order to admit incriminating statements that lie at the heart of the evil to which the Confrontation Clause is directed. In all events, the time has come to restore the Clause to its traditional, procedural role of requiring that testimonial statements – and only testimonial statements – be subjected to cross-examination.

II. Even if this Court applies the *Roberts* framework here, it still should reject the Washington Supreme Court's holding that Sylvia's examination is reliable, and hence admissible, because it "interlocks" with Petitioner's custodial statement.

A. Evidence that an accomplice's custodial statement interlocks with the defendant's is irrelevant to whether it is reliable – or, as *Roberts* puts it more specifically, whether it contains "particularized guarantees of trustworthiness." 448 U.S. at 66. In *Idaho v. Wright,* 497 U.S. 805 (1990), this Court



held that the particularized guarantees inquiry is limited to those circumstances that surround the making of the statement and that potentially make it inherently worthy of belief. The prosecution thus may not "bootstrap" on other evidence, such as the defendant's prior statements, to make a nontestifying accomplice's custodial statement appear more reliable.

B. Even if the interlocking nature of Sylvia's statement were relevant to the particularized guarantees inquiry, "the totality of the circumstances" surrounding its making, *Wright,* 497 U.S. at 820, still make it clear that the statement is *not* reliable. Sylvia's statement was made to prosecutorial authorities while in custody for suspected involvement in a felony. After the police told her that it "depend[ed] how the investigation continue[d]" as to whether she would be "detained more at this point or not," J.A. 81, she responded to the officers' leading questions by placing responsibility for the alleged assault on Petitioner's shoulders. What is more, Sylvia acknowledged that she had been "pretty intoxicated" and "like in shock" during the altercation, J.A. 88, 134, which would have impaired her perceptions. She even stated that she did not really see the critical events. Finally, Sylvia offered two inconsistent stories during a four-hour span, and her custodial statement interlocks with Petitioner's merely in the sense that it, like his, is ambiguous as to whether the alleged victim instigated the incident by attacking Petitioner with a weapon.

## ARGUMENT

### I. The Admission of Sylvia's Recorded Custodial Examination Violated the Confrontation Clause Because It Constituted Incriminating "Testimony" That Was Not Subjected To Cross-Examination.

#### A. The Confrontation Clause Traditionally Prohibits the Introduction of *Ex Parte* Testimonial Statements, Including Accomplices' Custodial Confessions, Against Criminal Defendants.

This Court repeatedly has noted that "[t]he right to confrontation did not originate with the Sixth Amendment, but

was a common-law right," *Salinger v. United States,* 272 U.S. 542, 548 (1926), "which had been previously adopted in the several states." *United States v. Reid,* 53 U.S. (12 How.) 361, 364 (1851); *see also Lilly v. Virginia,* 527 U.S. 116, 141 (Breyer, J., concurring); 3 Joseph Story, Commentaries on the Constitution of the United States 662 (1833) (Sixth Amendment "follow[ed] out the established course of the common law in all trials for crimes," including right to confrontation). An examination of (1) this common law right to confrontation, (2) the Framers' understanding of that right, and (3) this Court's applications of it demonstrates that the Confrontation Clause prohibits the admission of all *ex parte* testimonial statements, including accomplices' custodial confessions, against criminal defendants.

**1. The Development of the Right to Confrontation at Common Law.**

The right to confrontation has "a lineage that traces back to the beginnings of Western legal culture." *Coy v. Iowa,* 487 U.S. 1012, 1015 (1988). The ancient Hebrews and the Romans required accusing witnesses to give their testimony in front of the defendant. *See id.*; Deut. 19:15-18; Frank R. Herrmann & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause,* 34 Va. J. Int'l L. 481, 485-92 (1994) (recounting several examples in early Roman law). A twelfth-century treatise on ecclesiastical law in Europe likewise provided that "[i]in civil cases absent persons present testimony . . . when they cannot appear . . . . But in criminal cases absent persons *never* give testimony, except against the contumacious when the case has already commenced." *Id.* at 513 (translating Summa "Magister Gratianus in hoc opera" on C.3 q.9 (c. 1160 or 1170), *in* The Summa Parisiensis on the Decretum Gratiani 123 (Terrence P. McLaughlin ed. 1952). Even as continental Civil Law shifted towards more inquisitorial practices, the medieval English legal system generally adhered to the open and confrontational method of taking testimony. *See* John Fortescue, On the Laws and Governance of England 38-40 (1997).



"[T]he particular vice," however, "that gave impetus to the confrontation claim" was the emergence in sixteenth century England of the continental ritual of trying defendants on evidence that "consisted solely of ex parte affidavits or depositions." *California v. Green,* 399 U.S. 149, 157 (1970); *see also* 1 James Stephen, A History of the Criminal Law of England 221, 325 (1883). Magistrates generated these statements by examining alleged accomplices and other witnesses prior to trial. *Id.* The examinations were "intended only for the information of the court. The prisoner had no right to be, and probably never was, present." *Id.* at 221. At the trial itself, in turn, "[t]he proof was usually given by reading depositions, confessions of accomplices, letters, and the like; and this occasioned frequent demands by the prisoner to have his 'accusers,' *i.e.,* the witnesses against him, brought before him face to face." *Id.* at 326; *see also* 9 W.S. Holdsworth, History of the English Law 228 (1926). Yet "[t]he crown was not bound" by any clear rule "to produce its witnesses to be cross-examined by the accused," so courts sometimes refused these demands for confrontation. 9 Holdsworth, *supra,* at 224, 228.

The "infamous" trial of Sir Walter Raleigh for high treason in 1603 exemplified the unfairness of this state of affairs. *White v. Illinois,* 502 U.S. 346, 361 (1992) (Thomas, J., concurring in part and concurring in the judgment); *see generally* 1 Stephen, *supra,* at 333-36; 9 Holdsworth, *supra,* at 216-17, 226-28. The principal evidence against Raleigh was a transcribed examination of Lord Cobham, Raleigh's alleged co-conspirator, in which Cobham inculpated himself and Raleigh in a plot to seize the throne. When the prosecution presented this evidence, Raleigh demanded to "let my Accuser come face to face." *Trial of Sir Walter Raleigh,* 2 How. St. Tr. 1, 19 (1809). Prior to trial, Cobham had written a letter absolving Raleigh in the plot, and Raleigh "believed that Cobham would now testify in his favor." *Green,* 399 U.S. at 157 n.10. But the judges stated that "the law of the realm," which they construed as barring one charged party from

appearing at the trial of another, dictated that "lord Cobham cannot be brought." *Raleigh,* 2 How. St. Tr. at 24.

The judges nevertheless deemed Cobham's confession reliable enough to be introduced against Raleigh. They emphasized that it was self-inculpatory, *id.* at 14, 19, "voluntary, and not extracted from [him] upon any hopes or promise of Pardon." *Id.* at 29. It also – of particular relevance here – was consistent with portions of Raleigh's pretrial examination and the confessions of other alleged accomplices. *Id.* at 17. The jury convicted Raleigh largely on the basis of Cobham's extrajudicial testimony. Years later, one of his trial judges lamented that the trial "injured and degraded the justice of England"; another remarked that "I hope that we shall never see the like again." Christopher Smith, *Biography of Sir Walter Raleigh*, *in* Britannia Biographies, pt. 15 (1999) <http://www.britannia.com/bios/raleigh/out.html>.

The common law right to confrontation hardened to put an end to this practice. *See Green,* 399 U.S. at 156-57; 1 Samuel R. Gardiner, History of England 138 (1965); Daniel H. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. Pub. L. 381, 389-90 (1959). By the middle of the seventeenth century, witnesses were required to give their testimony face-to-face, and the accused had the right "to cross-examine the witnesses against him if he thought fit." 1 Stephen, *supra,* at 358. Accordingly, in 1662, the King's Bench ruled unanimously that although a custodial confession was valid "evidence against the party himself who made the confession," it "cannot be made use of as evidence against any others whom on his examination he confessed to be in the [crime]." *Case of Thomas Tong,* Kelyng J., 17, 18, 84 Eng. Rep. 1061-62 (1662). This right to confrontation was a bright-line rule. Even if a witness died, his prior *ex parte* statement to a governmental officer could not be admitted against the accused because the defendant "could not cross-examine" the declarant. *Rex v. Paine,* 90 Eng. Rep. 1062, 1062 (K.B. 1696) (statement to justice of the peace); *see also Eade v. Lingood,* 1 Atk. 203 (1747) (deposition before bankruptcy commissioners).



The writings of Hale and Blackstone confirm that the common law established a categorical rule that incriminating testimony be provided at trial and be subjected to cross-examination. Hale explained that cross-examination "beats and boults out the Truth much better" than *ex parte* examinations with "limited . . . Interrogatories in Writing." Matthew Hale, The History of the Common Law of England 164 (Charles M. Gray ed. 1713). The common law thus provided that "by [the] personal Appearance and Testimony of Witnesses, there is Opportunity of confronting the adverse Witnesses; . . . and by this Means great Opportunities are gained for the true and clear discovery of the Truth." *Id.*

Blackstone's description of the right to confrontation, which is even more detailed, is similarly absolute in requiring the prosecution to establish its case through live witnesses:

> This open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer, or his clerk in the ecclesiastical courts and all others that have borrowed their practice from civil law: where a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal. There an artful or careless scribe may make a witness speak what he never meant, by dressing up his depositions in his own forms and language; but he is here at liberty to correct and explain his meaning, if misunderstood, which he can never do after a written deposition is once taken. Besides the occasional questions of the judge, the jury, and the counsel, propounded to the witnesses on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled: and the confronting of adverse witnesses is also another opportunity of obtaining a clear discovery, which can never be had upon any other method of trial. . . . In short by this method of

> examination, and this only, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behavior, and inclinations of the witness; in which points all persons must appear alike, when their depositions are reduced to writing, and read to the judge, in the absence of those who made them: and yet as much may be frequently collected from the manner in which the evidence is delivered, as from the matter of it.

3 William Blackstone, Commentaries on the Laws of England *373-74 (1768). Witnesses were required to be available for cross-examination, in short, because this procedure was viewed as the "only" acceptable way of taking potentially incriminating testimony. *Id.* at *373. No other method – especially not *ex parte* depositions – was trusted to "sift out the truth." *Id.*

By the time that America's colonization was beginning in earnest, it was "settled doctrine" under the common law system that *ex parte* testimonial statements incriminating criminal defendants were inadmissible because "statements used as testimony must be made where the maker can be subjected to cross-examination." 5 Wigmore on Evidence § 1364, at 26 (Chadbourn rev. 1974). This rule flatly prevented the government from using accomplices' custodial statements against anyone other than themselves.

**2. The Confrontation Clause's Codification of the Common Law Rule.**

States and the Framers of the Sixth Amendment adopted the common law right to confrontation in order to prohibit abuses such as those in Raleigh's trial from ever coming to roost in the United States. *See United States v. Inadi*, 475 U.S. 387, 411 (Marshall, J., dissenting) ("The plight of Sir Walter Raleigh, condemned on the deposition of an alleged accomplice who had since recanted, may have loomed large in the eyes of those who drafted that constitutional guarantee."); *Mattox v. United States*, 156 U.S. 237, 242 (1895) ("primary



object" of Confrontation Clause is "to prevent depositions or ex parte affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness"); Francis H. Heller, The Sixth Amendment 104 (1951) (tracing Clause to reaction to Raleigh's trial). Like the English lawyers and judges before them, Americans understood this right to confrontation as prohibiting a nontestifying accomplice's examination or other *ex parte* testimony from ever being introduced against a criminal defendant.

While defending a client in a criminal case, for instance, John Adams noted that "[e]xaminations of witnesses upon Interrogatories, are only by the Civil Law. Interrogatories are unknown at common Law, and Englishmen and common Lawyers have an aversion to them if not an Abhorrence of them." 2 Legal Papers of John Adams 207 (Wroth & Zobel eds., 1965). The first Continental Congress delivered an address to foreigners detailing "the essential rights of the colonists," stressing that among these rights was the right of people accused of crimes to "'full enquiry, face to face, in open court'" concerning any testimony offered against them. Sources of Our Liberties 284 (Richard L. Perry ed. 1959) (quoting 1 *Journals of the American Congress, 1774-1788* 41-42 (1823)).

Thus, when an Antifederalist leader in the struggle for a bill of rights complained that the proposed constitution omitted "essential rights, which we have justly understood to be the rights of freemen," he quickly mentioned the right to confrontation and characterized it as an absolute procedural right: "Nothing can be more essential than the cross examining witnesses, and generally before the triers of the facts in question." Richard Henry Lee, *Letter IV by The Federal Farmer* (Oct. 15, 1787), *reprinted in* 1 Bernard Schwartz, The Bill of Rights: A Documentary History 469, 473 (1971). The author further explained that written testimony, even if given merely for expediency rather than in bad faith, was "almost useless; it must be frequently taken ex parte, and but very seldom leads to the proper discovery of truth." *Id.*

Shortly after the Bill of Rights was adopted, Chief Justice Marshall applied the Confrontation Clause in the trial of Colonel Aaron Burr in a manner that confirmed its prohibition against using *ex parte* testimonial statements to convict criminal defendants. The federal government indicted Burr for plotting to lead an illegal military expedition and sought to introduce declarations "tending to implicate Colonel Burr" that one Blennerhassett gave after the alleged plot was snuffed out. *United States v. Burr*, 25 F. Cas. 187, 193 (C.C. Va. 1807) (No. 14,694). The government argued that even though Blennerhassett was unavailable to testify at trial, his declarations were admissible because they related to a conspiracy and because he and Burr "were accomplices." *Id.* In addition to ruling that the declarations were not admissible as conspiratorial statements because they were not given in furtherance of the alleged wrongdoing and because the government did not allege a conspiracy in any event, Chief Justice Marshall emphatically rejected the government's alternative argument that Blennerhassett's declarations were admissible as accomplice confessions:

> I know not why . . . a man should have a constitutional claim to be confronted with the witnesses against him, if mere verbal declarations, made in his absence, may be evidence against him. I know of no principle in the preservation of which all are more concerned. I know of none, by undermining which, life, liberty, and property, might be more endangered. It is therefore incumbent on courts to be watchful of every inroad on a principle so truly important.

*Id.* at 193. Chief Justice Marshall then explained how the Confrontation Clause operated, echoing the King's Bench's decision in *Tong's Case* a century and one-half before:

> [W]here A., B., and C. are indicted for murdering D., . . . the declarations of one of the parties made in the absence of the others have *never* been admitted as evidence against the others.



> . . . .
>
> . . . If, for example, one of several men who had united in committing a murder should have said, that he with the others contemplated the fact which was afterwards committed, I know of *no case* which would warrant the admission of this testimony upon the trial of a person who was not present when the words were spoken.

*Id.* at 194-95 (emphasis added). Applying this bright-line rule, Chief Justice Marshall concluded that "the declarations of third persons not forming part of the transaction, and not made in the presence of the accused, cannot be received as evidence in this case." *Id.* at 198. He never inquired into whether Blennerhassett's confession interlocked with any statement Burr had offered or whether it otherwise evinced indications of reliability. The fact that Blennerhassett's declarations were given outside Burr's presence was enough to render them inadmissible.

Contemporary state court decisions applying parallel state provisions confirm that the American right to confrontation, replicating the common law right, was intended to bar the introduction of all incriminating testimony that had not been subjected cross-examination.[2] In *State v. Webb*, 2 N.C. (1 Hayw.) 103 (1794), the first reported decision involving a state confrontation provision, the North Carolina court refused to allow an *ex parte* deposition to be read into evidence against

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[2] Several states adopted bills or declarations of rights prior to the adoption of the federal Constitution, and every one of them explicitly provided for the right to confrontation. *See* Va. Bill of Rights § 8 (1776); Pa. Const. § A(IX) (1776); N.C. Decl. of Rights Art. VII (1776); Del. Decl. of Rights § 14 (1776); Md. Decl. of Rights Art. XIX (1776); Vt. Decl. of Rights Art. X (1777); Mass Const. Art. XII (1780); N.H. Bill of Rights Art. XV (1784). Several early court decisions in other states confirm that they, too, intended to codify the common law right. *See, e.g., Anthony v. State*, 19 Tenn. (Meigs) 265, 277-278 (1838) (state confrontation clause "was not to introduce a new principle" but to preserve a right won in England "after a long contest with the crown"); *Campbell v. State*, 11 Ga. 353, 374 (1852) ("The right of a party accused of a crime, to meet the witnesses against him, face to face, is no new principle. It is coeval with the Common Law."); *Summons v. Ohio*, 5 Ohio St. 325, 340 (1856) (same).

the accused, explaining that "it is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine." *Id.* at 103. A Tennessee court later expressed agreement with *Webb*, and upheld the admission of a deceased witness's prior accusatory testimony under the state confrontation clause only because it had been offered in the defendant's presence where "he had the liberty to cross-examine" the witness. *Johnston v. State*, 10 Tenn. (2 Yer.) 58, 59 (1821). The highest court in South Carolina, moreover, overturned a conviction because the trial court admitted a sworn deposition to a coroner implicating defendant. Brushing aside any suggestion that the "solemnity of the occasion or the weight of the testimony" permitted its admission, the court ruled that "such depositions are *ex parte*, and, therefore, utterly incompetent." *State v. Campbell*, 30 S.C.L. (1 Rich.) 124, 1844 WL 2558, at *1 (1844).

When this Court first considered the Confrontation Clause at length, it properly treated the right to confrontation, "in light of the law as it existed at the time it was adopted," *Mattox* 156 U.S. at 243, as a procedural requirement that all testimony offered against the accused be subject to cross-examination. This Court thus endorsed the South Carolina Court of Appeals' decision in *Campbell*, observing that since the testimony there was taken in the absence of the accused, "*of course* it was held to be inadmissible." *Mattox*, 156 U.S. at 241 (emphasis added). In contrast, this Court held in the case before it that the Confrontation Clause permitted the admission of testimony from a prior trial involving the same defendant and the same charge. "The substance of the constitutional protection," this Court explained, "is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination." *Id.* at 244. There is no mention anywhere in the opinion of the admissibility of out-of-court testimony turning on its purported reliability; the sole test was whether it had been subjected to cross-examination, a right that this Court stated defendants



"shall *under no circumstances* be deprived of." *Id.* at 244 (emphasis added).[3]

Other decisions during this period followed the same pattern. *Motes v. United States*, 178 U.S. 458 (1900), much like this case, involved the prosecution's use of an accomplice's "statement in the nature of a confession" that implicated the accused individuals in the charged offense, one of whom also confessed to the crime. *Id.* at 470-72. The accomplice had given his confession at the defendants' preliminary examination and then absconded. At trial, the government offered the accomplice's prior testimony as evidence against the other defendants. On review, this Court held that the admission of this testimony violated the confrontation rights of *all* of the other defendants, including the one who also had confessed. *Id.* at 471. This Court found it unnecessary to inquire whether the accomplice's confession interlocked with the other defendant's or appeared otherwise reliable. Rather, this Court followed an opinion from the Queen's Bench terming it an "absolute" rule that the accused have "a witness for the prosecution against him examined and cross-examined before the jury." *Id.* at 473-74 (quoting *Regina v. Scaife*, 2 Den. C.C. 281, 285 (1851) (Lord Campbell, C.J.)). In another case, this Court likewise applied the unequivocal common law rule that an accomplice's "confession is no evidence against the prisoner" in holding that an accomplice's guilty plea for theft was inadmissible against the accused to prove that the property he received was stolen. *Kirby v. United States*, 174 U.S. 47, 53-60 (1899). Once again, this Court made no reference to any possible exception for interlocking or otherwise reliable confessions.

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[3] In construing the confrontation section of the Philippine Bill of Rights, which is "substantially the provision of the 6th Amendment," this Court similarly explained that the section "intends to secure the accused the right to be tried, so far as facts provable by witnesses are concerned, by *only* such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give the accused an opportunity for cross-examination." *Dowdell v. United States*, 221 U.S. 325, 329-30 (1911) (emphasis added).

### 3. This Court's Modern Jurisprudence.

The results of this Court's modern confrontation decisions accord with the traditional prohibition against admitting any incriminating testimonial statements that have not been subjected to cross-examination.

This Court has found the Confrontation Clause violated each time it has considered a criminal case in which the prosecution introduced a nontestifying accomplice's custodial statement or a nontestifying witness's prior testimony that was not subject to cross-examination. *See Lilly,* 527 U.S. 116 (accomplice's custodial confession); *Idaho v. Wright,* 497 U.S. 805 (1990) (alleged victim's statements to doctor made in apparent coordination with police's investigation of defendant); *Lee v. Illinois,* 476 U.S. 530 (1986) (accomplice's custodial confession); *Berger v. California,* 393 U.S. 314 (1969) (per curiam) (preliminary hearing testimony); *Brookhart v. Janis,* 384 U.S. 1 (1966) (accomplice's custodial confession); *Douglas v. Alabama,* 380 U.S. 415 (1965) (accomplice's custodial confession); *Pointer v. Texas,* 380 U.S. 400 (1965) (testimony at preliminary hearing). In a series of cases beginning with *Bruton v. United States*, 391 U.S. 123 (1968), this Court also has held that in joint trials the Confrontation Clause prohibits the admission of nontestifying accomplices' custodial confessions against even the accomplices themselves when the confession also incriminates the codefendant. *See also Roberts v. Russell*, 392 U.S. 293 (1968) (per curiam); *Cruz v. New York,* 481 U.S. 186 (1987); *Gray v. Maryland,* 523 U.S. 185 (1998). The reason for this rule is that even if a judge instructs jurors to consider such a confession as evidence against only the accomplice, it is too likely that the jurors nevertheless will take it into account in adjudicating the guilt of the codefendant, in violation of the codefendant's right to confrontation. *E.g., Bruton,* 391 U.S. at 135

At the same time, this Court has condoned the use of an unavailable witness's prior testimony against the accused when the witness was subject to cross-examination during the prior testimony. *See Ohio v. Roberts,* 448 U.S. 56 (1980)



(preliminary hearing testimony where witness was subject to "the equivalent of significant cross-examination"); *Mancusi v. Stubbs*, 408 U.S. 204 (1972) (testimony from a prior trial on same charges where witness was subject to "adequate" cross-examination); *Green,* 399 U.S. 149 (preliminary hearing testimony when witness was subjected to "full" cross-examination). This Court also has allowed the prosecution to introduce hearsay statements against defendants when the statements were made under nontestimonial circumstances – that is, when they were made without litigation in mind. *See White,* 502 U.S. 346 (spontaneous declaration and medical-treatment statement by a child); *Bourjaily v. United States,* 483 U.S. 171 (1987) (co-conspirator's statement to another co-conspirator); *United States v. Inadi,* 475 U.S. 387 (1986) (same); *Dutton v. Evans,* 400 U.S. 74 (1970) (same).

The landscape of these decisions, interpreted through the prism of the traditional understanding of the right to confrontation, evokes a straightforward rule: The Confrontation Clause bars the government in criminal cases from introducing "testimony" that is not subject to (and has not previously been subjected to) cross-examination by the defendant. In concrete terms, this rule prohibits the prosecution from introducing *ex parte* in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially. *See White,* 502 U.S. at 365 (Thomas, J., concurring in part and concurring in judgment). The Clause, however, does not apply to hearsay statements made unrelated to any pending or potential prosecution.

### B. This Traditional Construction of the Confrontation Clause Dictates that Sylvia's Custodial Examination Was Inadmissible Against Petitioner, Regardless of Whether It Appears To Be "Reliable."

Applying this traditional, testimonial understanding of the Confrontation Clause, the proper result here is clear: Petitioner's confrontation rights were violated because the

State introduced a nontestifying accomplice's custodial examination implicating him in the charged offense. The accomplice gave this out-of-court statement to State officials for reasons related to its anticipated prosecution of Petitioner, but the statement was never subjected to cross-examination. Indeed, the transcript of Sylvia's examination reads just like *ex parte* deposition testimony, *see* J.A. 124-41, the precise kind of evidence the Confrontation Clause is meant to bar from criminal trials. And the State used the extrajudicial statement at trial just like other witness testimony: "The defendant's own wife," the State argued at closing, "gives damning evidence in this case. . . . She describes an intentional stabbing of Mr. Lee and completely refutes his claim of self-defense." Report of Proceedings at 468. The Confrontation Clause simply forbids the use of such untested accusations against criminal defendants. *See Lilly,* 527 U.S. at 143 (Scalia, J., concurring in part and concurring in the judgment) (use of nontestifying accomplice's confession against defendant is a "paradigmatic Confrontation Clause violation"); *Bruton,* 391 U.S. at 138 (Stewart, J., concurring) ("[A]n out-of-court accusation is universally conceded to be constitutionally inadmissible against the accused.").

Two of this Court's "incorporation"-era decisions, in fact, provide particularly forceful support for this result. In *Douglas,* which, like this case, involved the admissibility of a nontestifying accomplice's incriminating statement, this Court unanimously held that the defendant's "inability to cross-examine [the accomplice] as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause." 380 U.S. at 419. Even though the accomplice's confession appeared to be quite self-inculpatory and therefore potentially interlocking with the defendant's, *see id.* at 417 n.3, this Court did not find it necessary to examine whether the confession appeared reliable on this or any other basis. Rather, this Court construed the Confrontation Clause, consistent with the common law, as guaranteeing "the right to cross-examination" and found the Clause violated simply



because the out-of-court testimony had never been so tested. *Id.* at 419. In *Brookhart,* this Court likewise ruled in categorical terms that the defendant's confrontation right was violated because "there was introduced as evidence against him an alleged confession, made out of court by one of his co-defendants [who pleaded guilty before trial], who did not testify in court, and [the defendant] was therefore denied any opportunity whatever to confront and cross-examine the witness who made this very damaging statement." 384 U.S. at 4. The opinion never inquired into the confession's reliability.

The bright-line rule applied in these decisions, combined with the centuries of confrontation jurisprudence, renders irrelevant the Washington Supreme Court's conclusion that Sylvia's custodial statement was "reliable" because it "interlocked" with Petitioner's custodial statement. The right to confrontation is a procedural requirement that the government prove its case through live testimony that is subject to cross-examination. The introduction of Sylvia's *ex parte* custodial examination violated this rule because the State obtained her incriminating statements for use in its anticipated prosecution of Petitioner and Sylvia was unavailable for cross-examination.

### C. To the Extent that Reasoning in *Ohio v. Roberts* and Subsequent Cases Permits the Admission of Incriminating Testimonial Statements When Courts Deem Them Reliable, That Methodology Should Be Abandoned.

Although the results of every one of this Court's decisions accords with the traditional rule that the Confrontation Clause prohibits the admission of any incriminating testimonial statement that has not been subjected to cross-examination, some reasoning in this Court's recent confrontation cases admittedly suggests otherwise. In *Ohio v. Roberts,* instead of describing the Confrontation Clause as a bright-line procedural rule, this Court characterized the provision as one concerned with measuring the "trustworthiness" or "reliability" of evidence. 448 U.S. at 65. This Court consequently linked the Confrontation Clause directly to hearsay law and stated that the

Clause permits an extrajudicial statement to be admitted against the accused if the statement (i) falls within a firmly rooted hearsay exception or (ii) has "particularized guarantees of trustworthiness." *Id.* at 66. Although *Roberts* itself involved prior testimony that had been subjected to cross-examination, this Court indicated in subsequent cases involving incriminating testimonial statements that the framework's reliability-based inquiries may still be satisfied without prior cross-examination if the hearsay rule at issue or the "totality of the circumstances" suggest that the statement is sufficiently trustworthy. *See Lee,* 476 U.S. at 543 (accomplice's custodial confession); *Wright,* 497 U.S. at 819-20 (victim's statement to doctor in coordination with police); *Lilly,* 527 U.S. at 124-25 & 144-47 (plurality opinion & opinion of Rehnquist, C.J., concurring in the judgment) (accomplice's custodial confession).

In recent years, however, several Justices of this Court, numerous leading scholars, and the United States, under two different Solicitor Generals, have urged this Court to reconsider the *Roberts* framework with an eye toward reinstating the traditional, testimonial approach to the Clause. *See, e.g., Lilly,* 527 U.S. at 140-43 (Breyer, J., concurring); *White,* 502 U.S. at 366 (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment); Akhil Reed Amar, The Constitution and Criminal Procedure 129-31 & n.194 (1997); Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model,* 76 Minn. L. Rev. 559 (1992); Joshua C. Dickinson, *The Confrontation Clause and the Hearsay Rule: The Current State of a Failed Marriage in Need of a Quick Divorce,* 33 Creighton L. Rev. 763 (2000); Richard D. Friedman, *Confrontation: The Search for Basic Principles,* 86 Geo. L. Rev. 1011 (1998); Brief for United States at 17-29, *White v. Illinois,* 502 U.S. 346 (1992) (No. 90-6113); Brief for United States at 12-24, 27-28, 33-36, *United States v. Inadi,* 475 U.S. 387 (1986) (No. 84-1580). It should do so now.



This Court has not hesitated to reexamine reasoning that has crept into other areas of its jurisprudence when evidence has emerged indicating that such reasoning lacks constitutional grounding and breeds confusion in the law. In *Sandin v. Conner,* 515 U.S. 472 (1995), for instance, this Court reconsidered a due process methodology that had developed in a line of cases over a sixteen-year period beginning in 1979. Concluding that the methodology had "strayed from the real concerns undergirding the liberty protected by the Due Process Clause," this Court abandoned it and "return[ed] to the due process principles we believe were correctly established and applied in [earlier cases]." *Id.* at 483 (1995). In so doing, this Court explained that "[s]uch abandonment . . . does not technically require us to overrule any holding of this Court," but rather "only abandons an approach that in practice is difficult to administer and which produces anomalous results." *Id.* at 483 n.5. In *Collins v. Youngblood,* 497 U.S. 37 (1990), moreover, this Court reexamined the roots of the Ex Post Facto Clause and went so far as to overrule two cases that had "imported confusion into the interpretation of the [Clause]" and that its examination revealed were inconsistent with "the understanding of the term '*ex post facto* law' at the time the Constitution was adopted." *Id.* at 45-47.

The actions in these cases dictate that this Court take a similar step here. The confrontation methodology that this Court coined in *Roberts* and that it has applied in subsequent cases: (1) conflicts with the history, purpose, text, and structure of the Confrontation Clause; and (2) imports unnecessary confusion and inconsistency into the law. Consequently, this Court should abandon the *Roberts* framework and restore the Confrontation Clause's traditional bright-line rule prohibiting the admission of untested testimonial statements that incriminate criminal defendants. This action, as in *Sandin,* would not require this Court to overrule any of its prior decisions, but would merely "abandon[] an approach that in practice is difficult to administer and which produces anomalous results." 515 U.S. at 483 n.5.

### 1. The *Roberts* Framework Is at Odds With the History, Purpose, Text, and Structure of the Confrontation Clause.

Upon close inspection, the *Roberts* framework, as it has developed and been applied in subsequent cases, contravenes every conventional measure of constitutional law.

**History.** The development of the common law right to confrontation and all of this Court's decisions applying the Confrontation Clause until very recently center on the procedural requirement that incriminating testimony be subject to cross-examination, not, as the *Roberts* framework does, on the evidentiary question whether statements introduced against defendants are "reliable."

Reliability is a subjective concept that is the touchstone for hearsay law. Yet the right to confrontation developed long before and separately from the concept of hearsay. *See, e.g., Lilly,* 527 U.S. at 140-41 (Breyer, J., concurring). "Hearsay doctrine, like evidentiary law more generally, was not well developed even at the time the [Confrontation Clause] was adopted, much less during the previous centuries." Richard D. Friedman & Bridget McCormack, *Dial-In Testimony,* 150 U. Pa. L. Rev. 1171, 1208 (2002). Indeed, as the United States has reported to this Court, "as best as we can determine, not a word was spoken or written – by those who sought the adoption of the bill of rights, by the First Congress, or by state legislatures that ratified the Bill of Rights – to suggest that the confrontation right had anything to do with the general regulation of hearsay or the details of the law of evidence." Brief for United States at 19, *United States v. Inadi,* 475 U.S. 387 (1986) (No. 84-1580); *accord* Brief for United States at 21, *White v. Illinois,* 502 U.S. 346 (1992) (No. 90-6113) ("There is no historical basis, however, for regarding the right to confrontation as a general limitation on the admission of hearsay evidence."); *see also White,* 502 U.S. at 362 (Thomas, J., concurring in part and concurring in the judgment) ("There appears to be little if any indication in the historical record"



that the Confrontation Clause was understood as linked to hearsay law).

Contrary to *Roberts'* implication, therefore, "*[a]ccurate* trials was not the driving force behind the Confrontation Clause and related provisions. . . . [T]he Sixth Amendment guaranteed an *adversarial* trial by constitutionalizing a number of interdependent rights so the accused could present a defense and challenge the government's case. Defense cross-examination is crucial to this scheme, and confrontation sought to preserve defense opportunities for exercising *that right.*" Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History,* 27 Rutgers L.J. 77, 168 (1995) (emphasis added). The process of cross-examination, in other words, was guaranteed in and of itself; it was not understood to ebb and flow depending on the perceived reliability of extrajudicial testimony offered in any particular case. *See White,* 502 U.S. at 363 (Thomas, J., concurring in part and concurring in the judgment) ("Nor does it seem likely that the drafters of the Sixth Amendment intended to permit a defendant to be tried on the basis of ex parte affidavits found to be reliable."); *Summons v. State,* 5 Ohio St. 325, 325 (1856) (right to confrontation "has reference to the *personal presence* of the witnesses called to testify, and not to the *quality* or *competency* of the evidence to be given").

Indeed, as several scholars have pointed out, "neither in the [historical] statutes, caselaw, nor commentary was there a suggestion that, if courts determined that a particular item of type of testimony was reliable, then the accused lost his right to confrontation. On the contrary, the confrontation principle was a categorical rule, a basic matter of the procedures by which testimony was taken." Friedman & McCormack, *Dial-In Testimony,* 150 U. Pa. L. Rev. at 1208; *see also* Amar, *supra,* at 125-26, 130 (purpose of Clause was to codify bright-line rule requiring cross-examination of testimony, not to institute a balancing test); Berger, 76 Minn. L. Rev. at 559, 572 (The Court's "insistence that the sole function of the Confrontation Clause is to promote accurate fact-finding ignores the historical

background against which the Clause was drafted and overlooks the context in which it is placed." Complaints that led to creation of the right to confrontation "have less of an evidentiary than a procedural flavor."); Heller, *supra,* at 104-05 (Confrontation Clause is meant to prevent abuses of trial-by-affidavit and secures an "unequivocal" right to cross-examination). As a procedural mechanism, in other words, the Framers intended the right to confrontation to be applied in an unwavering manner to all witness testimony, not as an evidentiary evaluator to be invoked on a case-by-case basis depending upon judges' views of testimony's reliability.

Reliability, to be sure, is among the hallmarks of the adversarial process that the Confrontation Clause requires, but the Clause's history makes clear that it "does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to *assure* reliable evidence." *Maryland v. Craig,* 497 U.S. 836, 862 (1990) (Scalia, J., dissenting). Blackstone's description of the right to confrontation as requiring the prosecution to prove its case through in-court testimony before the defendant, the judge, and an observant jury emphasizes that such live testimony "clear[s] up the truth" in a manner that can "never" be assured through the use of prior declarations created on an *ex parte* basis. Blackstone, *supra,* at *373-74. This explains why Raleigh's trial came to be viewed as notorious even though the judges – in reasoning foreshadowing the trial court's and the Washington Supreme Court's logic in this case – found that Lord Cobham's confession appeared reliable in that it was self-inculpatory, voluntarily given, and corroborated by others' confessions. *See supra* at 14. Using the *Roberts* framework now to admit a nontestifying accomplice's confession on such bases utilizes a methodology tantamount to the one that ignited the march toward the Confrontation Clause several hundred years ago.

**Purpose.** The *Roberts* framework also wanders from the traditional purposes of the Confrontation Clause – namely, to prevent defendants from being convicted on the basis of untested accusations and to govern the method by which the



government presents testimony in criminal cases. "Viewed in light of [these] traditional purposes," as Justice Breyer has suggested, "the [*Roberts*] hearsay-based Confrontation Clause test . . . is both too narrow and too broad." *Lilly,* 527 U.S. at 141 (Breyer, J., concurring).

The *Roberts* framework is too narrow insofar as it authorizes the admission of *ex parte* statements "prepared as testimony for trial when such statements happen to fall within some well-recognized hearsay exception" or a court determines that they otherwise appear reliable. *Id.* The Framers of the Confrontation Clause believed that the *only way* to ensure that testimony was dependable enough to support a criminal conviction was to subject it to cross-examination. But while the *Roberts* framework respects cross-examination's usefulness in "mak[ing] it more difficult to lie against someone," *Roberts,* 448 U.S. at 63 n.6 (quotation omitted), or guaranteeing "the declarant's truthfulness," *Wright,* 497 U.S. at 820, it overlooks the fact that this is not the only – or even the primary – purpose of cross-examination. The process of face-to-face testimony subject to cross-examination also traditionally has been considered an indispensable method of enhancing the accuracy and thoroughness of the testimony of even perfectly honest witnesses. And it was this purpose that drove the Framers to incorporate the Confrontation Clause into the Constitution.

At common law, "the opinion of the time seems to have been that if a man came and swore to anything whatever, he ought to be believed unless he was directly contradicted." 1 Stephen, *supra,* at 399-400; *accord Benson v. United States,* 146 U.S. 325, 336 (1892). Blackstone thus endorsed cross-examination not as a means of exposing liars but of preventing the government from "dressing up" a witnesses' testimony without allowing him, upon questioning by the defendant, "to correct and explain his meaning, if misunderstood." 3 Blackstone, *supra,* at *373. In addition, because witnesses whose recollections are faulty may not realize them as such until searching questions from the defendant cause the witnesses to reexamine their perceptions, another leading

expositor of the English common law explained that cross-examination

> constitutes a strong test both of the *ability* and the willingness of the witness to declare the truth. By this means, the opportunity which the witness had of ascertaining the fact to which he testifies, his ability to acquire the requisite knowledge, his powers of memory, his situation with respect to the parties, his motives, are all severally examined and scrutinized.

Thomas Starkie, A Practical Treatise of the Law of Evidence 34 (4th ed. 1853) (emphasis added). American lawyers and judges at Founding likewise placed great faith in oaths and generally assumed that witnesses, whether making declarations in court or signing *ex parte* affidavits, would try to be honest. *See* Amar, *supra,* at 129.[4] Cross-examination was used "to correct any misconception of facts, to elicit truth, and justify the severe retribution awarded in cases of clear guilt." *Campbell,* 30 S.C.L. 124, 1844 WL 2558, at *2.

The right to confrontation, therefore, was not meant so much to smoke out lying witnesses as it was intended to prevent the government from using testimony from a witness who, in perfectly good faith, offered only some of the pertinent facts (often because the government asked only certain questions) or relayed mistaken impressions of often complicated or stressful events. *See* Amar, *supra,* at 125; Berger, 76 Minn. L. Rev. at 573-74. Prior to *Roberts*, in fact, this Court recognized that cross-examination ensured the accuracy of testimony given even under seemingly dependable circumstances, observing that confrontation operates "particularly to preserve the right of the accused to test the recollection of the witness in the exercise of cross-examination." *Dowdell,* 221 U.S. at 330; *see also Mattox,* 156

[4] The Constitution itself relies on oaths in several key passages. *See* U.S. Const. art. I, § 3, cl. 3 (requiring "oath or affirmation" when Senate sits in impeachment trial); *id.* art VI, cl. 3 (requiring various officers and legislators to take "oath or affirmation" to support the Constitution); *id.* amend. IV (requiring "oath or affirmation" for search or seizure warrant); *id.* amend. XIV, § 3 (disqualifying Confederate oath breakers).



U.S. at 242 (cross-examination allows defendant to "test[] the recollection and sift[] the conscience of the witness"). Indeed, the *Roberts* Court itself found the prior testimony at issue to be sufficiently reliable for confrontation purposes only because the testimony had been subjected to cross-examination. 448 U.S. at 73; *see also Mancusi,* 408 U.S. at 216 (same). The suggestions after *Roberts*, however, in *Lee, Wright,* and *Lilly* that testimony might be reliable enough for confrontation purposes in the absence of cross-examination overlook this additional truth-seeking purpose of cross-examination and misconceive the right to confrontation. This Court was correct in *Mattox* when it said that the right to "cross-examination," not any entitlement to reliable evidence, was the right that the Confrontation Clause guarantees that defendants "shall under no circumstances be deprived of." 156 U.S. at 244.

The *Roberts* framework, at the same time, is too broad insofar as it "make[s] a constitutional issue out of the admission of *any* relevant hearsay statement, even if that hearsay statement . . . was made long before the crime occurred and without relation to the prospect of a future trial." *Lilly,* 527 U.S. at 142 (Breyer, J., concurring). This requires every hearsay exception in every jurisdiction across the country that is applied in a criminal case to obtain the blessing of the Confrontation Clause. If nontestimonial hearsay evidence does not fall within a "firmly rooted" exception and a court finds that it does not evince sufficient indicia of reliability, the court must exclude it. Although this Court thus far has not invoked *Roberts* to exclude any such evidence, *see supra* at 23, fairly applying its framework in other cases unquestionably bans the introduction of some otherwise acceptable hearsay evidence, such as some business records or one friend's note to another. *See, e.g., Lilly,* 527 U.S. at 142 (Breyer, J., concurring); *United States v. Ordonez,* 737 F.2d 793, 802 (9th Cir. 1984) (invoking *Roberts* to bar admission of business ledger entries).

Such nontestimonial evidence, however, does not resemble the abusive *ex parte* examinations that the crown used in sixteenth century England or implicate any of the core

concerns of the Confrontation Clause. It is not created for prosecutorial authorities' use in investigating or prosecuting crime. Nor is it typically subject to molding by interested parties who may wish to lead the speaker in a certain direction or to discuss only certain aspects of an episode. And, unlike pretrial depositions or custodial examinations, nontestimonial hearsay does come to a jury as a second-best means (compared to trial testimony) of capturing and relaying a person's impressions and recollections. To the contrary, out-of-court statements made unconnected to any litigation tend to have an authenticity and probative value that "cannot be replicated even if the declarant testifies to the same matters in court." *Inadi,* 475 U.S. at 395 (describing co-conspirator statements); *see also White,* 502 U.S. at 356 (spontaneous utterances and statements for medial care have a "reliability [that] cannot be recaptured even by later in-court testimony").

Abandoning the *Roberts* framework would terminate the Confrontation Clause's unnecessary and potentially mischievous oversight of this sphere of ordinary hearsay law – a function that the Clause was never meant to perform.[5]

**Text.** Prohibiting the government from introducing *ex parte* testimonial statements, including accomplices' custodial examinations, against criminal defendants also accords with the text of the Confrontation Clause. The ordinary meaning of the Confrontation Clause, which states that the accused "shall have the right" to confrontation, U.S. Const. amend. VI, guarantees

[5] To the extent that this Court might be concerned about removing constitutional oversight entirely from the development and application of nontestimonial hearsay law, *cf. White,* 502 U.S. at 352, the Due Process Clause can carry out that role. As this Court stated in *Green,* "we may agree that considerations of due process, wholly apart from the Confrontation Clause, might prevent convictions where a reliable evidentiary basis is totally lacking." 399 U.S. at 163 n.15. Indeed, the Due Process Clause was already serving this role until *Roberts* effectively reassigned the job to the Sixth Amendment. *See Manson v. Brathwaite,* 432 U.S. 98, 106 (1977) (Due Process Clause forbids testimony that lacks "sufficient aspects of reliability" to be intelligently evaluated by the jury); *United States v. Shoupe,* 548 F.2d 636, 643-44 (6th Cir. 1977) (holding that disavowed, unsworn, and uncorroborated hearsay statement was insufficiently reliable to satisfy due process).



defendants an *unconditional* right to challenge the testimony of witnesses against him. There is no mention of reliability or accurate fact-finding. There are no qualifications or exceptions. *See White,* 502 U.S. at 363 (Thomas, J., concurring in part and concurring in the judgment) ("the Clause makes no distinction based on the reliability of the evidence presented"). But the *Roberts* framework rewrites the Clause to enforce the right to confrontation only if proffered testimony appears unreliable. Like the hearsay law it references, the framework makes exceptions as common as the rule.

The absence, however, of any such actual qualifications in the language of the Confrontation Clause is telling. Unlike situations in which a procedure or technology that was unknown to the Framers develops and this Court must hypothesize regarding how the Constitution is meant to apply under new circumstances, *see, e.g., Kyllo v. United States,* 533 U.S. 27 (2001), the Framers, as noted above, were keenly aware of possibility of using nontestifying accomplices' confessions and other untested extrajudicial testimony against criminal defendants. That they did not provide any potential exceptions to the prohibition against the use of such testimony is a forceful signal that the Confrontation Clause categorically prohibits the admission of any such untested statement, whether courts deem it reliable or not. This signal is especially telling when one puts the language of the Confrontation Clause side-by-side with value-laden provisions such as the Fourth Amendment (which prohibits "unreasonable" searches) and the Eighth Amendment (which prohibits "cruel and unusual" punishment). The unqualified language of the Confrontation Clause shows that it establishes a bright-line rule of procedure, not a malleable standard of admissibility.

The *Roberts* framework, moreover, fails to give proper meaning to the Clause's phrase "witnesses against." A person is a "witness against" another – in 1791 as today – only if that person "gives testimony" or testifies "[i]n judicial proceedings . . . for the purpose of establishing or making proof of some fact to a court." 2 Noah Webster, An American Dictionary of

the English Language (1828), *quoted in Craig,* 497 U.S. at 864 (Scalia, J., dissenting). But the *Roberts* framework transforms the words "witness against" into any "hearsay declarant [who] is not present for cross-examination," *Roberts,* 448 U.S. at 57, a definition that includes speakers of everyday utterances such as spontaneous declarations to their friends or their doctors, as well as authors of family or business records. This vast enlargement of the reach of the Clause beyond courtroom witnesses and persons whose testimony is offered through custodial examinations, affidavits, and similar materials, contravenes the ordinary meaning of the word "witness," which refers to those whose *testimony* is used against the defendant at trial, not to all hearsay declarants.

**Structure.** The *Roberts* framework also is at odds with several established constitutional rules of criminal procedure. As an initial matter, it has long been an unquestioned rule in the federal circuit courts that the Confrontation Clause requires trial judges to strike the testimony of any prosecution witness who invokes a privilege in order to avoid cross-examination on matters directly related to his direct testimony.[6] In such situations, the pivotal question is whether the witness's sudden unavailability "precludes inquiry into the details of his direct testimony" or merely concerns a collateral issue. *United States v. Cardillo,* 316 F.2d 606, 611 (2d Cir. 1963). But under the *Roberts* framework, even if the witness directly implicated the defendant in the crime and refused to answer a single question on cross-examination, his testimony would still be admissible if the judge deemed it reliable – a conclusion that the judge could well reach in light of the respect ordinarily given to trial testimony. The obvious unfairness of such a result – and its

[6] *See, e.g., United States v. Brooks*, 82 F.3d 50, 54-55 (2d. Cir. 1996); *United States v. Berrio-Londono*, 946 F.2d 158, 160-61 (1st Cir. 1991); *United States v. Zapeta*, 871 F.2d 616 623-24 (7th Cir. 1989); *United States v. Lord*, 711 F.2d 887, 892 (9th Cir. 1983); *United States v. Humphrey*, 696 F.2d 72, 75 (8th Cir. 1982); *United States v. LaRiche*, 549 F.2d 1088, 1096-97 (6th Cir. 1977); *United States v. Newman*, 490 F.2d 139, 145 (3d Cir. 1974); *United States v. Ginn*, 455 F.2d 980, 980 (5th Cir. 1972); *United States v. Norman*, 402 F.2d 73, 76-77 (9th Cir. 1968); *United States v. Smith*, 342 F.2d 525, 526 (4th Cir. 1965).



stark incompatibility with the structure of the Sixth Amendment – calls the *Roberts* framework into serious doubt.

Furthermore, although the same word should mean the same thing in different constitutional provisions, *see, e.g., United States v. Kozminski,* 487 U.S. 931, 945 (1988); *Kosydar v. National Cash Register Co.,* 417 U.S. 62, 67 n.5 (1974), and various constitutional provisions with similar objectives should compliment each other, the *Roberts* framework's enlargement of the scope of the Confrontation Clause is inconsistent with other constitutional provisions that concern adverse witnesses in criminal cases. The *Roberts* framework, for instance, posits that any speaker of any hearsay evidence offered against the accused constitutes a "witness" under the Confrontation Clause, but surely the government could not satisfy the Treason Clause – which requires "the Testimony of two Witnesses" to convict a defendant of treason, U.S. Const. Art. III, § 3, cl. 1 – by producing one live witness to say he saw the defendant commit the defense and that his brother also told him that the defendant broke the law. *See* Amar, *supra,* at 128 (elaborating on this point). Rather, the Treason Clause plainly requires two witnesses to give testimony against the defendant in connection with the government's prosecution.

Treating the Confrontation Clause as a procedural, rather than an evidentiary, rule also accords with the rule regarding witness testimony in the Fifth Amendment's Self-Incrimination Clause. That Clause, which prohibits compelling a person "to be a *witness* against himself" in a criminal case, U.S. Const. amend. V (emphasis added), bars the government from compelling in-court testimony as well as out-of-court confessions. And if the government obtains an out-of-court confession in violation of this procedural guarantee, the Clause bars it from introducing that statement in its case-in-chief at trial, regardless of whether it interlocks with others' confessions or appears somehow reliable. *See, e.g., Oregon v. Elstad,* 470 U.S. 298, 306 (1985). Abandoning the *Roberts* framework would bring the Confrontation Clause back in line with this related constitutional safeguard.

### 2. The *Roberts* Framework Breeds Inconsistent and Anomalous Results.

Because issues regarding the permissibility of introducing of out-of-court statements against criminal defendants arise frequently, this Court in *Roberts* correctly observed that trial courts and litigators need "certainty and consistency in the application of the Confrontation Clause." 448 U.S. at 73 n.12. The *Roberts* reliability-based framework accordingly was designed to "respond[] to the need for certainty in the workaday world of conducting criminal trials." 448 U.S. at 66.

Yet the framework in practice has provided anything but. Instead of treating the Confrontation Clause as a bright-line rule requiring testimonial statements open to cross-examination (but that does not apply to ordinary hearsay), *Roberts'* conception of the Clause "makes easy cases hard," requiring "courts [to] treat [the Clause] as a complex, amorphous, and technical expression of principles that are baffling even to lawyers." Friedman & McCormack, 150 U. Pa. L. Rev. at 1228. The inevitable result is that applications of the Confrontation Clause have become inconsistent and confusing, and they often generate anomalous results, admitting *ex parte* testimony (such as the accomplice's custodial examination here) that lies at the core of what the Clause is designed to prohibit.

Courts applying the *Roberts* framework regularly reach opposite conclusions concerning reliability in cases with the same facts.[7] They also often reach the same conclusions in cases with opposite facts.[8] The "particularized guarantees of

[7] *Compare, e.g., United States v. Castelan,* 219 F.3d 690, 695 (7th Cir. 2000) (accomplice confession unreliable in part because DEA agent told accomplice that "he could help himself by cooperating with the agents") *with State v. Marshall,* 737 N.E.2d 1005, 1009 (Ohio App. 2000) (accomplice confession reliable even though the police told him that they "may be able to cut him some slack if he confessed").

[8] *Compare, e.g., State v. Franco*, 950 P.2d 348, 353 (Or. App. 1999) (accomplice confession reliable because it was given in response to a "basic, non-leading question") *with People v. Jordan,* 2002 WL 50594, at *5 (Cal. App. 2002) (accomplice confession reliable even though police investigator "primarily used leading questions").



reliability" test, in fact, leaves courts so much case-by-case discretion they have been liable to find that almost anything evinces reliability, generating puzzling situations in which someone trying to understand the law learns that both *fact x* and *fact not x* support admitting incriminating testimonial statements.[9]

A nonexhaustive list of typical factors courts invoke to allow the admission of testimonial materials against defendants includes: (1) the declarant was not under arrest when he gave the statement, *People v. Schutte*, 613 N.W.2d 370, 376 (Mich. 2000); (2) the declarant's statement was against his penal interest, *Holiday v. State,* 14 S.W.3d 784, 786-87 (Tex. App. 2000); (3) the statement was voluntary, *People v. Thomas*, 730 N.E.2d 618, 626 (Ill. App. 2000); (4) the declarant exhibited no signs of mental instability, *Stevens*, 29 P.3d at 318; (5) the declarant's "demeanor during the interview" was consistent with truthfulness, *Bintz*, 650 N.W.2d at 918; (6) the statement was given "during normal [business] hours," *Jordan,* 2002 WL 50594, at *5; (7) the declarant was not under the influence of any chemical substance when he gave his statement, *id.*; (8) the declarant was accompanied by his attorney, *People v. Campbell*, 721 N.E.2d at 1225, 1230 (Ill. App. 1999); (9) the declarant implicated a good friend in his statement, *id.*; (10) the statement was given shortly after the events at issue, *Farrell,* 34 P.3d at 407; (11) the declarant was not agitated when he implicated the defendant, *id.* at 407-08; (12) the declarant did

[9] *Compare, e.g., People v. Farrell,* 34 P.3d 401, 407 (Colo. 2001) (accomplice confession reliable because it was given "immediately after" the events at issue) *with Stevens v. People*, 29 P.3d 305, 316 (Colo. 2001) (accomplice confession reliable in part because "two years had passed since the murder"), *cert. denied,* 535 U.S. 975 (2002); *Farrell*, 34 P.3d at 407 (accomplice confession reliable because the portion inculpating others was "highly detailed") *with United States v. Photogrammetric Data Servs., Inc.,* 259 F.3d 229 (4th Cir. 2001) (statement to police reliable because the portion inculpating others was "fleeting"), *cert. denied,* 535 U.S. 926 (2002); *Nowlin v. Commonwealth,* 579 S.E.2d 367, 372 (Va. App. 2003) (custodial statement reliable because the declarant had been explicitly charged with a crime and advised of her *Miranda* rights) *with State v. Bintz,* 650 N.W.2d 913, 918 (Wis. App.) (custodial statement reliable because the declarant was not told that he was under any suspicion), *rev. denied,* 653 N.W.2d 891 (Wis. 2002).

not mention any animosity toward the defendant, *Gabow v. Commonwealth,* 34 S.W.3d 63, 78 (Ky. 2000); (13) the declarant implicated the defendant "inferentially" instead of "directly," *id.* at 79; (14) the declarant was placed under oath, *United States v. Dolah,* 245 F.3d 98, 105 (2d Cir. 2001); (15) the declarant's statement was consistent with other witnesses' trial testimony, *United States v. Thomas,* 2002 WL 429383, at *1 (4th Cir.), *cert. denied,* 535 U.S. 1066 (2002); (16) the declarant's statement was given from personal knowledge, *id.*; (17) the declarant knew the defendant and his associates were dangerous, *Stevens,* 29 P.3d at 316; (18) the declarant was in custody on charges unrelated to those against the defendant when he gave his statement, *id.*; (19) the declarant's statement was "given in a formal proceeding," *United States v. Papajohn,* 212 F.3d 1112, 1120 (8th Cir. 2000); and, of course, (20) the declarant's statement "interlocked" with the defendant's custodial statement, J.A. 15-16.

Every single one of these factors could have been present under the English *ex parte* affidavit system that the right to confrontation intended to abolish. Indeed, at least half of them were present in Raleigh's prosecution.[10] Many of the factors are so common or imprecise as to be almost meaningless.

Thus, although the *Lilly* plurality stated that "[i]t is *highly unlikely* that the presumptive unreliability that attaches to accomplices' confessions that shift or spread blame can be

[10] England's attorney general and the judges in Raleigh's case noted that Lord Cobham's custodial examination was dependable because: (1) "he would not turn the weapon against his own bosom, and accuse himself to accuse [Raleigh], *Raleigh,* 2 How. St. Tr. at 14 – in other words, because it was against Cobham's penal interest; (2) the confession was not given "in passion" or out of malice against Raleigh, *id.* at 14; (3) Cobham's demeanor was consistent with truthfulness, *id.*; (4) Raleigh was an "old friend" of Cobham's, *id.* at 18; (5) Cobham's confession was "voluntary," *id.* at 29; (6) the confession "was not extracted from lord Cobham upon any hopes or promise of Pardon," *id.*; and (7) Cobham's confession was consistent with the examinations of other alleged co-conspirators, *id.* at 17. It also is apparent Cobham was not under the influence; that his custodial examination was given from his personal knowledge, *see* Gardiner, *supra,* at 116-20; and that it was offered in a formal proceeding before the Privy Council. *See* 1 Stephen, *supra,* at 333.



effectively rebutted when the statements are given under conditions that implicate the core concerns of the old *ex parte* affidavit practice," 527 U.S. at 137 (emphasis added), it is perhaps unsurprising that courts in fact deem such statements reliable quite frequently. A recent study of seventy post-*Lilly* appellate decisions involving accomplices' custodial statements that shift or spread blame to the defendant found that courts in twenty-five of those cases (over 35%) deemed the statements sufficiently reliable to satisfy the Confrontation Clause. Roger W. Kirst, *Appellate Court Answers to the Confrontation Questions in* Lilly v. Virginia, 53 Syr. L. Rev. 87, 104-05, 112-38 (2003); *see also* Pet. for Cert. at 17-18 (collecting decisions along these lines). Courts reached these results even when the declarant claimed that he served only as the "lookout" while the defendant committed a murder, *Marshall,* 737 N.E.2d at 1009; when the declarant claimed that he waited around the corner while the defendant shot two victims, *Taylor v. Commonwealth,* 63 S.W.3d 151, 166-67 (Ky. 2001) & *Taylor v. Commonwealth,* 821 S.W.2d 72, 74 (Ky. 1990); and when the declarant denied any involvement in the killing at issue and, just as in *Lilly*, told an interrogating police officer that his brother did it. *State v. Murillo,* 623 N.W.2d 187, 188-89, 191-94 (Wis. App. 2001).

The *Roberts* framework also allows courts to admit other types of statements at the heart of the "evil to which the [Confrontation Clause] was directed." *White,* 502 U.S. at 365 (Thomas, J., concurring in part and concurring in the judgment). One federal court of appeals "regularly" allows the admission of nontestifying accomplices' plea allocutions against other defendants. *Dolah,* 245 F.3d at 105; *but see Garrison v. State*, 726 So.2d 1144, 1148 (Miss. 1998). Two other federal courts of appeals, applying *Roberts* and *Lilly,* have held that a nontestifying witness's grand jury testimony that inculpates a defendant is admissible against him at trial when it satisfies "the equivalent circumstantial guarantees of trustworthiness" test under Federal Rule of Evidence 807. *Papajohn,* 212 F.3d at 1116-20; *accord Thomas,* 2002 WL

429383, at *1-2. Another court has held that a nontestifying witness's preliminary hearing testimony may be offered at trial against defendants who did not have an opportunity to cross-examine the witnesses. *See Bintz,* 650 N.W.2d at 918-20. Without mentioning this Court's decisions in *Pointer*, *Berger*, or *Motes*, each of which held that the Confrontation Clause was violated by the admission of untested preliminary hearing testimony, the court went straight to the *Roberts* framework and held that "prior testimony . . . falls under a firmly rooted hearsay exception." *Bintz,* 650 N.W.2d at 920.

Enough is enough. The *Roberts* framework is incapable of bringing consistency or coherence to the Confrontation Clause. It also subverts the integrity of the Clause by permitting the use of statements that flout the history, purpose, text, and structure of the provision. This Court should take this opportunity to restore the Confrontation Clause to a bright-line rule that requires that all testimonial statements offered against criminal defendants be subject to cross-examination. Such a holding would bring order and respect back to this important constitutional provision and return it to the straightforward procedural role it served for hundreds of years before *Roberts.* It also would terminate the Confrontation Clause's improper meddling with ordinary hearsay law.

## II. Even If the Perceived Reliability of Sylvia's Statement Did Affect Its Admissibility, Its Introduction Still Violated the Confrontation Clause Because Its Interlocking Nature Does Not Establish That It Has "Particularized Guarantees of Trustworthiness."

Even if this Court decides to apply the *Roberts* framework to this case, it should still reverse the judgment of the Washington Supreme Court. That Court held that Sylvia's custodial statement is "reliable," and hence admissible, because it "interlocks" with Petitioner's custodial statement. J.A. 2. But this Court's precedent dictates that the interlocking nature of an accomplices' confession is irrelevant to whether that statement has the reliability, or the "particularized guarantees of trustworthiness," *Roberts,* 448 U.S. at 66, necessary to allow



its admission over a Confrontation Clause objection. And even if interlocking evidence were relevant to the particularized guarantees inquiry, the totality of the circumstances surrounding Sylvia's statement still demonstrate that it is not sufficiently reliable to satisfy the Confrontation Clause.

### A. Whether an Accomplice's Custodial Statement Interlocks with the Defendant's Is Irrelevant to the Particularized Guarantees Inquiry.

The *Roberts* framework's "particularized guarantees of trustworthiness" test permits a hearsay statement to be used against the accused only when "the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility." *Wright,* 497 U.S. at 820. This Court's two most recent decisions applying that test make it clear that the interlocking nature of an accomplice's custodial statement is irrelevant to this test.

In *Wright,* the prosecution contended that extrajudicial statements of a child declarant had "particularized guarantees" in part because they were corroborated by other evidence at trial. This Court squarely rejected that argument, holding that "we think the relevant circumstances [to the particularized guarantees inquiry] include *only those that surround the making of the statement* and that render the declarant particularly worthy of belief." *Id.* at 819 (emphasis added); *see also id.* at 826 (corroborating evidence is "irrelevant"). "To be admissible under the Confrontation Clause," this Court continued, "hearsay evidence used to convict a criminal defendant must possess indicia of reliability by virtue of its inherent trustworthiness, *not by reference to other evidence at trial.*" *Id.* at 822 (emphasis added).

The prosecution, put another way by the *Wright* opinion, may not "bootstrap" on other evidence to introduce an incriminating hearsay statement that the Confrontation Clause otherwise deems inadmissible. *Id.* at 823. And lest there be any doubt that this anti-bootstrapping rule applies across the board, this Court explicitly dispelled the suggestion that passages in *Cruz* and *Lee* made the "interlocking nature" of

accomplices' confessions relevant to whether they are admissible against criminal defendants. *Cruz* "said nothing" to suggest that such a circumstance was relevant, this Court explained, and the *Lee* Court "rejected the 'interlock' theory in that case." *Wright,* 497 U.S. at 823-24 & n.*.

The plurality opinion in *Lilly* confirms that *Wright* prohibits any reference to any kind of interlocking evidence in assessing a statement's admissibility under the Confrontation Clause. In *Lilly,* the Virginia Supreme Court held that a nontestifying accomplice's confession was reliable in part because of "the correspondence between [the accomplice's] account and the accounts of other persons acquired by law enforcement authorities" and because it was corroborated by another accomplice's trial testimony. *Lilly v. Commonwealth,* 499 S.E.2d 522, 534 (Va. 1998). A four-justice plurality of this Court, applying *Wright*, squarely rejected this basis of establishing reliability, holding that the fact "[t]hat other evidence at trial corroborated portions of [the accomplice's] statements is irrelevant." *Lilly v. Virginia,* 527 U.S. at 137 (plurality opinion). (This plurality opinion constitutes the holding of the Court on this point under the "narrowest grounds" rule of *Marks v. United States,* 430 U.S. 188, 193 (1977), because Justices Scalia and Thomas each concurred on the basis that the Confrontation Clause prohibits the introduction of all nontestifying accomplices' custodial statements, regardless of the statements' reliability.) If evidence that an accomplice's statement is corroborated by other accomplices' statements is irrelevant to the particularized guarantees inquiry, evidence that an accomplice's statement is corroborated by the defendants' statement must also be irrelevant.

This Court's anti-bootstrapping principle, in fact, applies with special force to accomplices' custodial statements that interlock with defendants' statements. In *Wright,* this Court stated that when circumstances indicate that "the declarant is particularly *un*likely to be telling the truth, . . . the presence of evidence tending to corroborate the truth of the statement would be no substitute for cross-examination of the declarant at



trial" because cross-examination "would be *highly useful* to probe the declarant's state of mind when he made the statements." *Wright,* 497 U.S. at 822-23 (second emphasis added). The scenario of interlocking custodial statements presents just such a situation. Accomplices' custodial statements that shift or spread blame (as Sylvia's statement does) are "presumptively unreliable" because such persons are inherently motivated to divert police scrutiny away from themselves. *Lee,* 476 U.S. at 541; *see also Lilly,* 527 U.S. at 131 (plurality opinion) ("inherently unreliable"); *id.* at 146 (Rehnquist, C.J., concurring in the judgment) (portions that incriminate defendant viewed with "special suspicion"); *Bruton,* 391 U.S. at 136 ("inevitably suspect"). Any similarity between suspected accomplices' custodial statements and the defendant's statements cannot serve as a proxy for the Confrontation Clause's demand that testimony be given under circumstances that ensure that the whole truth will emerge.

Finally, applying *Wright*'s anti-bootstrapping rule to interlocking custodial statements accords with the method by which hearsay law assesses the reliability of out-of-court statements, which the *Roberts* framework, in turn, assimilates into the Confrontation Clause. *See Wright,* 497 U.S. at 820. The traditionally recognized exceptions to the hearsay rule are designed to allow the introduction of statements given under circumstances that operate as "a practicable substitute for the ordinary test of cross-examination, . . . if not quite equivalent" to that test. 5 Wigmore, *supra,* § 1422. Consequently, "[t]he circumstantial guarantees of trustworthiness on which the various specific exceptions to the hearsay rule are based are those that existed at the time the statement was made and do not include those that may be added by using hindsight." *Wright,* 497 U.S. at 820 (quotation omitted). In addition, the declaration sought to be admitted "must be made before dispute or litigation, so that it was made without bias on account of the existence of a dispute or litigation which the declarant might be supposed to favor." 5 Wigmore, *supra,* § 1420 (quoting *Sugden v. St. Leonards,* 1 P.D. 154, 240 (1876)).

The interlocking confession rationale violates both of these requirements. First, it purports to find a hearsay statement reliable by using hindsight, *e.g.*, a *post hoc* comparison between the substance of the statement and another person's statement. Second, the interlocking confession rationale, by definition, concerns extrajudicial statements made to authorities on account of an existing dispute and upcoming criminal prosecution, potentially aimed at the declarant. Under these circumstances, both the declarant and the prosecutorial authorities have obvious motivations to color the past events at issue in ways that will serve them in the future. *See Lee,* 476 U.S. at 541 (accomplices giving custodial confessions have "a strong motivation to implicate the defendant and to exonerate [themselves]") (quotation omitted); *Bruton,* 391 U.S. at 136 (same); Brief for United States at 23-24, *United States v. Inadi,* 475 U.S. 387 (1986) (No. 84-1580) (discussing parties' interests when recording *ex parte* testimony, such as accomplice confessions). This inherent risk of distortion is so great that one simply cannot say that the interlocking nature of such a statement may later indicate that it is "free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation." Wigmore, *supra,* § 1420, *quoted in Wright,* 497 U.S. at 819.

### B. Even if Evidence of Interlock Were Relevant to the Particularized Guarantees Inquiry, the Totality of the Circumstances Surrounding Sylvia's Statement Still Demonstrate That It Is Not Sufficiently Reliable To Satisfy the Confrontation Clause.

The Washington Supreme Court did not simply hold that the interlocking nature of Sylvia's custodial statement suggested that it was reliable; it ruled that this fact alone automatically "satisfie[d] the requirement of reliability under the confrontation clause." J.A. 19 (emphasis removed). The Court thus deemed it irrelevant that the Washington Court of Appeals had listed several other circumstances indicating that Sylvia's statement was unreliable.



This treatment of the interlocking nature of the statements as a reliability trump card squarely conflicts with this Court's precedent. In *Wright,* this Court held in no uncertain terms that "the 'particularized guarantees of trustworthiness' required for admission under the Confrontation Clause must . . . be drawn from *the totality of the circumstances* that surround the making of the statement and that render the declarant particularly worthy of belief." 497 U.S. at 820 (emphasis added). Accordingly, even if evidence of "interlock" is somehow a relevant circumstance "surround[ing] the making of the statement," *id.,* one must also consider other such circumstances in assessing whether the statement is sufficiently reliable to satisfy the Confrontation Clause.[11]

When the totality of the circumstances surrounding Sylvia's statement are considered, it becomes clear that the statement is *not* so trustworthy and comprehensive that cross-examination would have been of marginal utility. First and foremost, it bears repeating that Sylvia made the statement at issue to prosecutorial authorities at a police department while in custody for suspected involvement in a felony. The police told her that it "depend[ed] how the investigation continue[d]" as to whether she would be "detained more at this point or not." J.A. 81. Portions of Sylvia's resulting responses to police questioning related exclusively to Petitioner's actions

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[11] This Court's decision in *Cruz v. New York,* 481 U.S. 186 (1987), also demonstrates even if evidence of interlock is relevant, other factors must bear on the reliability of accomplices' custodial statements. The question presented in that case was whether a nontestifying codefendant's confession incriminating the defendant, where it "is not directly admissible against the defendant," may be introduced at a joint trial when it "interlocks" with the defendant's custodial statement – a question this Court answered in the negative. 481 U.S. at 188-93. If accomplices' confessions were automatically admissible against defendants whenever they interlock with defendants' custodial statements, then the issue in *Cruz* – which assumed that the interlocking confession was not admissible against the defendant – would have been nonsensical. The premise that accomplices' interlocking confessions can be inadmissible against defendants and this Court's ruling that the interlocking confession in that case was, in fact, inadmissible, *id.* at 193-94, confirm that the Confrontation Clause, at a minimum, requires courts to consider factors beyond interlocking evidence. *See Wright,* 497 U.S. at 823 n.* (discussing *Cruz*).

and placed responsibility for the alleged assault on his shoulders. And Sylvia was never cross-examined in any manner by any representative of Petitioner.

These facts alone require that Sylvia's statement be viewed with "special suspicion," *Lilly,* 527 U.S. at 146 (Rehnquist, C.J., concurring in the judgment) (quoting *Lee,* 476 U.S. at 541), and make it "highly unlikely" that Sylvia's statement is sufficiently reliable to satisfy the Confrontation Clause. *Lilly,* 527 U.S. at 137 (plurality opinion). As this Court explained in *Lee,* "[d]ue to [a codefendant's] strong motivation to implicate the defendant and to exonerate [herself], a codefendant's statement about what the defendant said or did are less credible than ordinary hearsay evidence." 476 U.S. at 541 (quotation omitted). This reasoning obviously applies with particular force when, as here, the declarant is a potential accomplice who realizes that she may or may not be charged with a crime depending in part on what she tells the police. *See Lilly,* 527 U.S. at 138 (plurality opinion) ("When a suspect is in custody for his obvious involvement in serious crimes, his knowledge that anything he says may be used against him militates against depending on his veracity.").

But the fact that Sylvia's statement constitutes a suspected accomplice's *ex parte* custodial statement is just one of several circumstances that severely undermine its reliability. Sylvia's statement described exclusively past events, thus lacking the "spontaneity" that sometimes suggests reliability. *Wright,* 497 U.S. at 821. Worse yet, several aspects of her physical and mental condition impeded her ability to record and relay reliable impressions of the events she observed. Sylvia acknowledged during her interrogation that she had been "pretty intoxicated" while at Lee's apartment, J.A. 88, a circumstance that "militates against" reliable recollections. *See Lilly,* 527 U.S. at 139 (plurality opinion). She also stated that she was "like in shock" during the stabbing, J.A. 134, which also would have impaired the accuracy of her observations and perhaps her memory as well. *See Wright,* 497 U.S. at 821 (indicating that altered "mental state" undermines reliability).



The manner in which the police interrogated Sylvia also undercuts the reliability of her statement. The plurality in *Lilly* held that the accomplice's custodial statement there was unreliable in part because he "was primarily responding to the officers' leading questions." 527 U.S. at 139; *see also* Blackstone, *supra,* at *373 (describing danger that examiner in *ex parte* examinations will "dress[] up" the testimony in "his own forms and language" to "make the witness speak what he never meant"). The same is true here. As the Washington Court of Appeals noted, Sylvia's custodial statement "consisted of answers to specific questions," J.A. 29, not of a lengthy narration or even a conversational give-and-take. *See also* J.A. 124-41 (transcript of statement). Indeed, on the critical issue of whether Petitioner acted in self-defense, the investigating officer asked Sylvia a leading question – whether Lee did anything "to fight back from this assault . . . after he was stabbed" J.A. 137 – that explicitly assumed Petitioner assaulted Lee before Lee attacked him. This question and others indicate that the police, as in *Lee,* "having already interrogated [the eventual defendant], no doubt knew what they were looking for" in examining his apparent accomplice. 476 U.S. at 544.

While a witness's "consistent repetition" under these circumstances might to some extent mitigate the effects of such questioning, *see Wright,* 497 U.S. at 821, Sylvia gave two inconsistent statements within about four hours, further indicating a lack of truthfulness. She first claimed, for instance, that Lee sexually assaulted her that day, J.A. 89-93, but she later maintained that he assaulted her several weeks before. J.A. 130-31. In addition, she first claimed that Lee invited her and Petitioner over to his apartment "to go drinking," J.A. 86, but she later maintained that they went over to collect a debt and to confront Lee about sexually assaulting her. J.A. 133. She also claimed initially that she did not see the stabbing because she was behind a wall. J.A. 93. After several hours in the stationhouse, however, she said that she saw Petitioner stab Lee, J.A. 134, but then added that she "shut [her] eyes" during the stabbing and "didn't really watch." *Id.*

The latter comments, in fact, generate concern not only because they are inconsistent with her earlier remarks but also because they show, as the Washington Court of Appeals observed, that "[c]ross-examination could reveal that [Sylvia] lacked knowledge of what happened." J.A. 30. At the very best, Sylvia claimed that she "didn't really watch" the critical events upon which Petitioner's self-defense claim turned. J.A. 134. It thus is almost impossible to imagine a cross-examination of Sylvia proving to be "of marginal utility," *Wright,* 497 U.S. at 820, even if its only purpose was to undercut the State's claim that her testimony strongly refuted Petitioner's claim of self-defense.

Finally, the part of Sylvia's statement that the Washington Supreme Court held "interlocked" with Petitioner's did so only in the sense that "both of the Crawfords' statements are ambiguous as to whether Lee ever actually possessed a weapon. . . . '[N]either Michael or Sylvia clearly stated that Lee had a weapon in hand from which Michael was simply defending himself.'" J.A. 18 (quoting dissent from court of appeals). But ambiguity is hardly an indicator of reliability, especially when the statement concerns a crucial factual matter that is presumably either so or not so. As this Court remarked in *Lee,* when an accomplice's statements bearing "to any significant degree on the defendant's participation in the crime are not thoroughly substantiated by the defendant's own confession, the admission of the statements poses too serious a threat to the accuracy of the verdict to be countenanced by the Sixth Amendment." 476 U.S. at 545. Since the issue whether Lee was threatening to harm Petitioner lies at the heart of this case and "it is unclear from Sylvia's statement when, if ever, Lee possessed a weapon," J.A. 18, Sylvia's statement's confluence with Petitioner's in that regard does not enhance its trustworthiness to the level that the *Roberts* framework requires to allow its admission against Petitioner.

## CONCLUSION

For the foregoing reasons, the judgment of the Washington Supreme Court should be reversed.

Respectfully submitted,

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# In The Supreme Court of the United States

MICHAEL D. CRAWFORD,

*Petitioner,*

vs.

STATE OF WASHINGTON,

*Respondent.*

**On Writ Of Certiorari To The Supreme Court Of Washington**

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## COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether this Court should abandon over a century of this Court's jurisprudence holding that the Confrontation Clause is not intended to exclude all hearsay, in favor of a framework designed to eliminate relevant and reliable evidence that is unfavorable to the defense.

2. Whether this Court should confirm this court's long established rule that the "interlocking confession" of an unavailable co-defendant is sufficiently reliable to satisfy the Confrontation Clause.

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## SUMMARY OF ARGUMENT

The admission of a co-defendant's interlocking confession does not violate the Confrontation Clause because the interlocking nature of the testimony marks it with such trustworthiness that there is no material departure from the reason for the Confrontation Clause's general rule.

The Confrontation Clause was not meant to eliminate all hearsay statements against a defendant. Some hearsay statements are sufficiently reliable so that adversarial testing is not required. This Court has consistently recognized that "interlocking confessions" fall into this reliable category of evidence.

The Supreme Court of Washington's holding that the second statement of Sylvia Crawford was properly admitted as an interlocking confession was consistent with the framework established in *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), and this Court's subsequent case law.

In *Roberts*, this Court established that hearsay is admissible in satisfaction of the Confrontation Clause if it bears adequate "indicia of reliability." In *Lee v. Illinois*, 476 U.S. 530 (1986), this Court announced a rule that a co-defendant's confession that is identical to the defendant's own confession in all material respects may be admitted against the defendant and will not violate the defendant's right to confrontation. Thereafter, this Court confirmed the "interlocking confession" rule, *New Mexico v. Earnest*, 477 U.S. 648, 650 (1986), *Cruz v. New York*, 481 U.S. 186 (1987), and modified the rule, *Idaho v. Wright*, 497 U.S. 805 (1990), but never expressly discarded the rule and never overruled *Lee*. Consequently, the Supreme Court of Washington properly relied upon *Lee* in reaching its

decision that the interlocking nature of Sylvia and Michael Crawford's confessions satisfied the Confrontation Clause.

The *Roberts* framework represents a fair balance between a defendant's right to confrontation and valid considerations of public policy and should not be abandoned.

Any procedure short of a literal interpretation of the Confrontation Clause, i.e., exclusion of all hearsay against the defendant, is nothing more than a compromise between a defendant's right to confrontation and various considerations of public policy. The *Roberts* framework has been successfully applied by the lower courts for 23 years, necessitating only occasional fine-tuning by this Court, and is based upon over a century of this Court's evolving Confrontation Clause jurisprudence. This Court should reject the Petitioner's invitation to overrule this jurisprudence, only to substitute a procedure that is simply a compromise that will not resolve any more of the problems surrounding the competing interests of public policy considerations and the right to confrontation than does the *Roberts* framework.



## ARGUMENT

### I. THE ADMISSION OF A CO-DEFENDANT'S INTERLOCKING CONFESSION DOES NOT VIOLATE THE CONFRONTATION CLAUSE BECAUSE THE INTERLOCKING NATURE OF THE TESTIMONY MARKS IT WITH SUCH TRUSTWORTHINESS THAT THERE IS NO MATERIAL DEPARTURE FROM THE REASON FOR THE CONFRONTATION CLAUSE'S GENERAL RULE.

#### A. Confrontation Clause General Rule.

The Sixth Amendment's Confrontation Clause provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The Sixth Amendment is applicable to the States through the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403-405 (1965). The Confrontation Clause does not exist within a vacuum, but against the background of a general rule against hearsay that is riddled with multiple exceptions. *See, e.g.*, Federal Rules of Evidence 803, 804.

Taken literally, the Confrontation Clause would require the exclusion of any statement made by a declarant not present at trial. "But, if thus applied, the Clause would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme." *Ohio v. Roberts*, 448 U.S. 56, 63 (1980). "While a literal interpretation of the Confrontation Clause could bar the use of any out-of-court statements when the declarant is unavailable, this Court has rejected that view as 'unintended and too extreme.'" *Bourjaily v. United States*, 487 U.S. 171, 182 (1987) (citing *Ohio v. Roberts*, 448 U.S. at 63).

### B. Competing Public Policy Interests.

"General Rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case." *Mattox v. United States*, 156 U.S. 237, 243 (1895). "Significantly, every jurisdiction has a strong interest in effective law enforcement, and in the development and precise formulation of the rules of evidence applicable in criminal proceedings." *Ohio v. Roberts*, 448 U.S. at 64. Therefore, "the Clause permits, where necessary, the admission of certain hearsay statements against a defendant despite the defendant's inability to confront the declarant at trial." *Idaho v. Wright*, 497 U.S. 805, 814 (1990) (quoting *Maryland v. Craig*, 497 U.S. 836, 847 (1990). This Court has "been careful not to equate the Confrontation Clause's prohibitions with the general rule prohibiting the admission of hearsay statements." *Idaho v. Wright*, 497 U.S. at 814 (citations omitted).

### C. The *Ohio v. Roberts* Framework.

In *Ohio v. Roberts*, this Court explained that, as a general rule, "[t]he Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay." 448 U.S. at 65. The first is, in the usual case, the prosecution must demonstrate the unavailability of the declarant. *Id.* The second reflects the Clause's "underlying purpose [which is] to augment accuracy in the fact finding process by ensuring the defendant an effective means to test adverse evidence. . . ." 448 U.S. at 65.

Therefore, when a hearsay declarant is not available for cross-examination at trial, the Confrontation Clause also requires that the statement is admissible only if it



bears adequate "indicia of reliability." 448 U.S. at 66. This "reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. *Id.* "In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Id.*

### D. The Interlocking Confession Rule.

The concept of "interlocking confessions" and their inherent reliability was part of federal jurisprudence even before this Court first addressed the issue in *Parker v. Randolph*, 442 U.S. 62 (1979). *See, e.g., U.S. ex rel. Catanzaro v. Manusci*, 404 F.2d 296 (2nd Cir. 1968) (in which the court found the "interlocking confessions" of jointly tried co-defendants were sufficiently reliable to satisfy the Confrontation Clause). In *Parker v. Randolph*, a plurality of this Court determined that the "interlocking confessions" of jointly tried co-defendants were sufficiently reliable to satisfy the Confrontation Clause. *Parker v. Randolph, generally*.[1] This Court next addressed "interlocking confessions" in *Lee v. Illinois*, 476 U.S. 530 (1986), in which this Court recognized that "[o]bviously, when codefendants' confessions are identical in all material respects, the likelihood that they are accurate is significantly increased." *Lee,* 476 U.S. at 545. This Court further explained:

> If those portions of the codefendant's purportedly "interlocking" statement which bear to any significant degree on the defendant's participation

[1] Abrogated by *Cruz v. New York*, 481 U.S. 186 (1987).

> in the crime are not thoroughly substantiated by the defendant's own confession, the admission of the statement poses too serious a threat to the accuracy of the verdict to be countenanced by the Sixth Amendment. In other words, when the discrepancies between the statements are not insignificant, the codefendant's confession may not be admitted.

*Lee,* 476 U.S. at 545. The logical inference of this statement is that when the discrepancies between the statements *are* insignificant, then the codefendant's statement *may* be admitted.

Following *Lee v. Illinois*, this Court confirmed, *in dicta*, the continued viability of the interlocking confession rule in *New Mexico v. Earnest*, 477 U.S. 648, 650 (1986) (citing the *Lee* test for the admissibility of interlocking confessions in relation to this Court's holding that the lack of cross-examination is not necessarily fatal to the admissibility of evidence under the Confrontation Clause). The Court next addressed the reliability of interlocking confessions in *Cruz v. New York*, 481 U.S. 186 (1987), in which this Court said, "[q]uite obviously, what the 'interlocking' nature of the codefendant's confession pertains to is not its *harmfulness* but rather its *reliability*: If it confirms essentially the same facts as the defendant's own confession it is more likely to be true." *Cruz*, 481 U.S. at 192 (emphasis in original). And while *Cruz* is not factually similar to this case, Cruz's significance lies in this Court's clear recognition of the reliability of an interlocking confession, i.e., a confession that is virtually identical to the defendant's own confession in all material respects. This Court has not overruled *Lee* or *Cruz*, nor expressly abandoned the concept of the reliability of "interlocking confessions." The Washington Supreme Court specifically relied upon *Lee* in



ruling that Sylvia Crawford's confession to the police was reliable based upon the significant degree in which it interlocked with Petitioner's own confession. J.A. 15.

Petitioner has interpreted this Court's decision in *Idaho v. Wright*, 497 U.S. 805 (1990), as having over-ruled the portion of *Lee* suggesting that a co-defendant's statement may be admitted when the discrepancies between that statement and the defendant's statement are insignificant. The Court in *Wright* merely commented that, in *Lee*, it had considered and rejected the interlocking nature of a co-defendant's and defendant's confessions "in that case." *Wright,* 497 U.S. at 824. A plain reading of *Lee* clearly shows that this Court did not reject the *concept* of interlocking confessions, it simply determined that the confessions in question did not sufficiently interlock. *Lee,* 476 U.S. at 546.

Moreover, *Wright* is factually distinguishable from *Lee*. In *Wright* the State was advocating that a non-testifying victim's statement was reliable because it was corroborated by the *physical evidence* obtained during an examination by a physician. *Wright,* 497 U.S. at 809-811, 819. It was in that context that this Court held, as a general proposition: "hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." *Wright,* 497 U.S. at 822. Therefore, *Wright* clearly applies only to corroboration by physical evidence. Since this case involves corroboration by the defendant's virtually identical confession, the standard set forth in *Lee* applies.

## II. THE ADMISSION OF THE HEARSAY STATEMENTS AT TRIAL DID NOT VIOLATE PETITIONER'S CONFRONTATION CLAUSE RIGHTS BECAUSE THE SECOND STATEMENT WAS AN INTERLOCKING CONFESSION.

### A. The admission of Sylvia Crawford's confession at trial.

At trial, Petitioner claimed that he acted in self-defense and he invoked Washington's marital privilege statute to prevent his wife Sylvia from testifying against him. J.A. at 3. The trial court admitted both of Sylvia's statements on the grounds that the statements would not violate the marital privilege and because the court determined that the statements were sufficiently reliable to alleviate Confrontation Clause concerns. *Id.*

### B. Application of the interlocking confession rule to Petitioner's case.

The underlying philosophy of the *Roberts* framework is reliability. *See generally*, *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). No hearsay is more reliable than a co-defendant's tape recorded confession that is identical in all material respects to the defendant's own tape recorded confession. The interlocking nature of Sylvia and Michael Crawford's confessions is irrefutable. The Washington Supreme Court found the second statements of Sylvia and Michael Crawford "*are virtually identical*." J.A. 19. The only potential "discrepancy" between the statements of Sylvia and Michael Crawford concerned whether the victim was armed at the time Michael Crawford stabbed him. On this point the statements were identical in that they were both equally ambiguous. Consequently, applying the *Roberts* framework and the *Lee* standard, the second statement of



Sylvia Crawford was clearly marked with such trustworthiness that there is no material departure from the reasons for the Confrontation Clause's general rule.

Common sense demands recognition that a codefendant's tape recorded confession, that is in all material respects virtually identical to the defendant's tape recorded confession, is reliable for purposes of satisfying the Confrontation Clause under the *Roberts* framework. "[T]he veracity of hearsay statements is sufficiently dependable to allow the untested admission of such statements against an accused when ... it contains 'particularized guarantees of trustworthiness' such that adversarial testing would be expected to add little, if anything, to the statements' reliability." *Lilly v. Virginia*, 527 U.S. 116, 124-125 (1999) (quoting *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)). It is difficult to imagine a scenario where adversarial testing would add less to the reliability of a co-defendant's tape recorded statement than when it is virtually identical to the defendant's tape recorded confession. Although Petitioner suggests that confrontation could have helped flesh out Sylvia Crawford's ambiguity about whether the victim was armed when Petitioner stabbed him, this actually could only have harmed the Petitioner in light of his own admissions at trial.[2] Respondent respectfully

[2] Mr. Crawford admitted on cross-examination that he had lied to the police in giving his first statement because he knew he had something to hide. RP 323. He admitted that, even though he was claiming he stabbed Mr. Lee in self-defense, he made no attempt to report the incident to the police. RP 335. Mr. Crawford acknowledged that he had walked four to five blocks while bleeding from a cut to his hand and had passed several telephones and open businesses, yet made no attempt to obtain assistance for his injury or to summons the police, or obtain any type of aid. RP 336-337. Mr. Crawford also admitted that

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requests this Court to hold that the Washington Supreme Court properly relied upon and applied *Lee* in finding that the confession of Sylvia Crawford was sufficiently reliable so as to satisfy the Confrontation Clause.

## III. THE *ROBERTS* FRAMEWORK REPRESENTS A FAIR COMPROMISE BETWEEN A DEFENDANT'S RIGHT TO CONFRONTATION AND OTHER IMPORTANT CONSIDERATIONS OF PUBLIC POLICY AND SHOULD NOT BE ABANDONED.

### A. Petitioner's suggestion for a new Confrontation Clause framework should be rejected as being unsupported by this Court's prior cases, and as being a wholesale abandonment of the doctrine of *stare decisis*.

This Court has recognized that "general rules" such as the Confrontation Clause, "however beneficent in their

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even when the police approached and became readily available for him to report the stabbing and obtain medical assistance, his response was to turn and walk away from them. RP 338.

Mr. Crawford further admitted that he was the first one to become aggressive during the altercation with Mr. Lee. RP 345. Mr. Crawford admitted that he had told detectives that he had been trying to stab Mr. Lee "straight in" but Mr. Lee was blocking. RP 346. Mr. Crawford admitted that in both of his taped statements following the stabbing, he never claimed to have acted in self-defense. RP 347. Finally, on re-cross examination, Mr. Crawford admitted that when he had first been contacted by the police following the stabbing, he did not say anything about self defense or about being attacked by Mr. Lee, but had instead said "What would you have done if it was your woman? He tried to rape her." RP 361-362.



operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case." *Mattox v. U.S.*, 156 U.S. 237, 243 (1895). It was in consideration of such public policy considerations that this Court developed the *Roberts* framework. *See*, *Roberts*, 448 U.S. at 64 (citing *Mattox* for the above quote). The *Roberts* framework is based upon necessity and reliability and followed almost a century of this Court's jurisprudence and independent legal analysis confirming that the Confrontation Clause was not intended to exclude all hearsay. *Roberts*, 448 U.S. at 62-67.

During the ensuing 23 years since the *Roberts* decision, the trend of this Court has been to adhere to and refine this framework.[3] Petitioner and *Amici*, however,

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[3] *See, e.g.*, *Tennessee v. Street*, 471 U.S. 409 (1985) (No confrontation violation where co-defendant's confession was not admitted as substantive evidence but as rebuttal to defendant's claim of a coerced confession); *United States v. Inadi*, 475 U.S. 387 (1986) (necessity rationale of *Roberts* did not require a showing of unavailability in all cases); *Lee v. Illinois*, 476 U.S. 530 (1986) (reliability can be established by interlocking confessions which are identical in all material respects); *New Mexico v. Earnest*, 477 U.S. 648 (1986) (State is entitled to an opportunity to overcome the weighty presumption of unreliability attaching to codefendant statements by demonstrating that the particular statement at issue bears sufficient "indicia of reliability" to satisfy Confrontation Clause concerns); *Cruz v. New York*, 481 U.S. 186 (1987) (interlocking nature of a codefendant's confession pertains to reliability, not harmfulness); *Bourjaily v. United States*, 483 U.S. 171 (1987) (co-conspirator exception to the hearsay rule is a firmly rooted exception that satisfies the reliability requirement of Roberts); *Idaho v. Wright*, 497 U.S. 805 (1990) (reliability of out of court statement may not be supported by the interlocking nature of physical evidence); *White v. Illinois*, 502 U.S. 346 (1992) (excited utterances and statements made in the course of obtaining medical assistance are sufficiently reliable to satisfy *Roberts* and the Confrontation Clause); and *Lilly v. Virginia*, 527 U.S. 116 (1999) (statements against penal interests are not "firmly

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would have this Court discard both this past 23 years of successful application of the *Roberts* framework and more than a century of this Court's jurisprudence and independent legal analysis confirming that the Confrontation Clause was not intended to exclude all hearsay. In place of the *Roberts* framework, they would put an untested framework that is designed to eliminate otherwise relevant and reliable evidence, with no real reasoning for the replacement other than that *Roberts* is not "traditional" and they do not like the results.

The present case, and its focus on interlocking confessions, is a perfect example of how the proposals of Petitioner and *Amici* would exclude relevant and reliable evidence. The confessions of Sylvia and Michael Crawford were given within minutes of each other and were tape recorded to prevent a later denial of the content of the statement. The statements are virtually identical in all material respects, each co-defendant confirming the actions of the other and themselves. There is no valid or rational reason why this evidence should not be admitted, especially considering that it was the defendant's choice to make Sylvia unavailable for cross-examination (regardless of the fact that there was no wrongdoing). Yet, the proposals of Petitioner and *Amici* would exclude this relevant and reliable evidence.

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rooted" so as to satisfy reliability requirement of *Roberts* and Confrontation Clause).



### B. Petitioner's suggested new standard is merely a compromise of the competing values at issue that is more favorable to the defense.

This Court has recognized that the *Roberts* framework balances a defendant's right to confrontation with other important competing considerations of public policy. *Roberts*, 448 U.S. at 64. The Confrontation Clause, literally interpreted, would permit absolutely no hearsay evidence against a defendant, a result that this Court has long rejected as both unintended and extreme. *Idaho v. Wright*, 497 U.S. 805, 814 (1990) (citing *Bourjaily v. U.S.*, 483 U.S. 171 (1987) (quoting *Ohio v. Roberts*, 448 U.S. 56, 63 (1980))). Anything other than a literal interpretation and application of the Confrontation Clause is really nothing more than a compromise between a defendant's right to confrontation and various considerations of public policy.

Both the "traditional approach" proposed by Petitioner and "testimonial approach" proposed by *Amici* are such compromises. Each proposes that this Court interpret the Confrontation Clause to exclude only *testimonial* hearsay.[4] While both Petitioner and *Amici* argue that the Clause is *intended* to exclude only testimonial hearsay, there is nothing in their recitations of the history of the Confrontation Clause that could be so interpreted.

This Court has specifically recognized that "[o]rdinarily, a witness is considered to be a witness 'against' a defendant for purposes of the Confrontation

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[4] There appears, however, to be no real consensus among the briefs of Petitioner and *Amici* on what constitutes this "testimonial hearsay."

Clause . . . if his testimony is part of the body of evidence that the jury may consider in assessing his guilt." *Cruz v. New York*, 481 U.S. 186, 190 (1987) (emphasis in original). Such evidence would necessarily include all hearsay evidence admitted against a defendant. Consequently, the proposals of Petitioner and *Amici* are really designed to eliminate otherwise reliable and probative evidence which is unfavorable to a defendant.

Petitioner and *Amici* argue that their proposals will provide more consistency. Their proposals appear to merely exchange a trial court's determination of reliability with a trial court's determination of reasonableness, i.e., whether a declarant reasonably believed his statement was in furtherance of litigation, rather than *Roberts'* "indicia of reliability."

Finally, it is noteworthy that the Court in *Roberts* was "[c]onvinced that 'no rule will perfectly resolve all possible problems'" and rejected the "invitation to overrule a near-century of jurisprudence" in order to create a new rule. 448 U.S. at 68, n.9, (quoting Natali, *Green, Dutton,* and *Chambers*: Three Cases in Search of a Theory, 7 Rutgers-Camden L.J. 43, 73 (1975)). Petitioner and *Amici* have conceded that their proposals similarly will not perfectly resolve all possible problems. Under these circumstances, the Court should again reject such an invitation.



## CONCLUSION

Based upon the above, Respondent respectfully requests that this Court affirm the decision of the Supreme Court of Washington.

Respectfully submitted this 17th day of September, 2003.

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IN THE
# Supreme Court of the United States

MICHAEL D. CRAWFORD,
*Petitioner,*

v.

STATE OF WASHINGTON,
*Respondent.*

On Writ of Certiorari
to the Supreme Court of Washington

## REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF FOR PETITIONER

After a full round of briefing, it has become clear that this Court should abandon the *Roberts* framework and hold that the Confrontation Clause prohibits the admission of *ex parte* testimonial statements, regardless of their perceived reliability. The United States agrees with Petitioner that *Roberts* should be reconsidered because the "historical basis of right to confrontation" (Br. at 10) supports applying the Clause only to in-court testimony and its functional equivalent. Even the State does not seriously dispute that the testimonial approach has a pedigree that is vastly superior to that of the *Roberts* framework. And it can hardly be doubted that the testimonial approach generates the predictability and stability that the *Roberts* framework inherently lacks. While the State and the United States assert that enforcing the Confrontation Clause as the Framers intended could sometimes impede a search for truth, this concern does not supply a legitimate or compelling reason to perpetuate *Roberts*' reliability-based conception of the Confrontation Clause, either *in toto* or (as the United States would have it) as applied only to testimonial statements. The right to confrontation is one of the very few procedural rules that the Constitution deems essential to the integrity of any criminal conviction obtained at trial, and it cannot be dispensed with simply because a trial court thinks – as it might in a civil case – that it can still get to an acceptable level of "truth" without it.

The State's defense of the Washington Supreme Court's "interlocking confession" rule is weaker still. It attempts to transform this Court's rejection of an interlocking theory in *Lee v. Illinois,* 476 U.S. 530 (1986), into a holding that condones such analysis. And it ignores the power of this Court's subsequent ruling in *Idaho v. Wright,* 497 U.S. 805 (1990), that courts cannot use other testimony at trial to bootstrap incriminating hearsay into evidence and that, in any event, the totality of the circumstances, not any single factor,

determines reliability. Accordingly, even if this Court applies the *Roberts* framework here, it still should hold that the admission of Sylvia's statement violated the Confrontation Clause.

## I. This Court Should Abandon the *Roberts* Framework in Favor of the Testimonial Approach.

The State urges this Court to reject the testimonial approach. The United States advocates something of a crossbreed approach, under which courts would apply the testimonial approach to nontestimonial hearsay, but would revert back to the *Roberts* framework regarding testimonial hearsay. But nothing in the State's brief or the United States' amicus brief should dissuade this Court from applying the pure testimonial approach to hold that the Confrontation Clause prohibited the admission of Sylvia's custodial statement. That approach is superior to each part of the *Roberts* framework in terms of every conventional method of constitutional interpretation. And nothing in the doctrine of *stare decisis* forecloses returning the right to confrontation, as the testimonial approach would, to its traditional mode of operation.

### A. The Testimonial Approach is Superior to the *Roberts* Framework in Terms of Every Conventional Method of Constitutional Interpretation.

The State does not dispute Petitioner's arguments (Petr. Br. at 12-20, 28-34, 36-37) that the testimonial approach, unlike the *Roberts* framework, comports with the history, purpose, and structure of the Confrontation Clause. The State contends, however, (1) that the testimonial approach is at odds with the text of the Clause; (2) that it would not provide any more consistency than the *Roberts* framework produces; and (3) that it improperly would implement a "public policy" that is



"more favorable to the defense." Resp. Br. at 13-14. In addition, the United States, while accepting Petitioner's position that the scope of the Confrontation Clause should be trimmed back to cover only testimonial hearsay, urges this Court to retain *Roberts*' reliability-based framework as applied to such statements. None of these arguments has merit.

First, contrary to the State's assertion (Resp. Br. at 3, 13), the testimonial approach is perfectly consistent with the text of the Confrontation Clause. As Petitioner explained in his opening brief, the testimonial approach rests in large part on the meaning of the word "witness." By investing that word with its ordinary meaning – one who "gives testimony" – the Clause applies only to hearsay statements that declarants would reasonably expect to be used prosecutorially. Petr. Br. at 35-36. It does not exclude all (or even most) hearsay.

While this Court has noted that a "literal interpretation of the Confrontation Clause *could* bar the use of any out-of-court statements when the declarant is unavailable," *Bourjaily v. United States*, 487 U.S. 171, 182 (1987) (emphasis added), the testimonial approach's construction of the word "witness" is truer to the constitutional text and avoids this "unintended" and "extreme" result. *See id.* It also accords with this Court's statement in *Cruz v. New York*, 481 U.S. 186 (1987), that "[o]rdinarily, a witness is considered to be a witness 'against' a defendant for purposes of the Confrontation Clause . . . if his *testimony* is part of the body of evidence that the jury may consider in assessing his guilt." *Id.* at 190 (emphasis added). The testimonial approach thus represents a better reading of the Confrontation Clause than the *Roberts* framework's construction, which interprets the term "witness" to mean any declarant of any statement to anyone at any time.

Second, the testimonial approach produces much more consistent and predictable results than the *Roberts* framework generates. Under the testimonial approach, the critical question is whether a reasonable person in the declarant's position would have expected her statement to be used prosecutorially – that is, as evidence against someone during a criminal inquiry. In the vast majority of cases, including those raising the most obvious confrontation problems, this is an easy question to answer. Someone giving an incriminating statement at a legal proceeding, to the police, or under similar investigative circumstances would reasonably expect his statement to be used prosecutorially. On the other hand, a person speaking to a co-conspirator in furtherance of a conspiracy; describing her present sense impressions; keeping routine business records; or speaking in a multitude of other ways in the course of ordinary daily life would not reasonably expect her statement to be used prosecutorially.[1]

The *Roberts* "particularized guarantees of trustworthiness" inquiry, however, makes every case involving a

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[1] While the United States notes that many of these modern hearsay exceptions have roots that go back many years, *see* Amicus Br. of United States at 13 n.5, it incorrectly suggests that the "against penal interest" exception – the exception that the Washington courts invoked here – has such a pedigree. The plurality opinion in *Lilly v. Virginia,* 527 U.S. 116 (1999), explained without disagreement that the practice of admitting accomplices' confessions that incriminate criminal defendants (that is, testimonial statements against penal interest), is "of quite recent vintage." *Id.* at 130. The passage of Wigmore that the United States cites is in accord. That passage describes the roots of the hearsay exception for statements against *pecuniary or proprietary* interest, and specifically notes that older English common law and American courts "exclude[ed] confessions of a crime or statements of facts against penal interest, made by third persons" from the scope of this general "statements against interest" exception to the hearsay rule. 5 Wigmore on Evidence § 1476, at 351-58 (Chadbourn rev. 1974).



testimonial statement dependent on a multitude of facts and circumstances and admits to no dependable formulae, even when – as cases such as *Lilly v. Virginia,* 527 U.S. 116 (1999), demonstrate – it should be plain that there is a serious confrontation problem. *See* Petr. Br. at 38-40; Amicus Br. of NACDL & ACLU at 15-21. It also depends heavily on subjective views of trial and appellate judges. *Id.* Abandoning *Roberts*' reliability-based methodology in favor of the testimonial approach would take the current guesswork and malleability out of the Confrontation Clause.

Third, the State is simply wrong that Petitioner is asking this Court merely to replace one public policy compromise with another that is more favorable to defendants. In every post-*Roberts* case this Court has decided, the testimonial approach dictates the same conclusion as the *Roberts* framework produced. *See* Petr. Br. at 22-23. In future cases, as Petitioner explained in his opening brief, applying the testimonial approach could in some cases benefit defendants compared to the *Roberts* framework, while in others it could work to their disadvantage by terminating the Confrontation Clause's oversight over ordinary hearsay issues. Petr. Br. at 33; *see also* Motion of Law Professors for Leave to File Amicus Br. at 2 ("Our interest in this case is not to support either prosecution or defense – in some settings the [testimonial approach] would favor one side and in some settings the other – but to assist the placement of the Confrontation Clause on a proper footing, as expressing a rather narrow but hard-edged right.").

In any event, the testimonial approach is grounded in constitutional precepts, not public policy. And when, as here, a particular rule is "imposed directly by the Constitution, . . . [i]t is not for this Court" or any party "to employ untethered notions of what might be good public policy" to justify a certain result. *Whitmore v. Arkansas,* 495 U.S. 149, 161

(1990); *see also Members of the City Council v. Taxpayers for Vincent,* 466 U.S. 789, 815-16 (1984) (even if "[p]lausible public policy arguments" support a position, "it by no means follows that it is therefore constitutionally mandated" or "constitutionally permissible"). To the extent that the *Roberts* framework and the State's meager defense of it are based upon policy considerations, this Court is bound to reject those arguments in deference to the judgments that the Framers reached in creating the Sixth Amendment.

Finally, the United States is mistaken in suggesting (Br. at 17-27) that it is appropriate to revert back to the *Roberts* framework's reliability-based methodology when, as here, the declarants of testimonial statements are unavailable. In stark contrast to the analysis in the first half of the United States' brief, this argument lacks any historical, textual, or structural support. Indeed, as the United States previously recognized in discussing *Roberts*' particularized guarantees inquiry, "it seems . . . unlikely that the Framers intended the right to confrontation to be transformed into a general test for reliability of out-of-court statements." Brief for United States at 27-28, *White v. Illinois,* 502 U.S 346 (1992) (No. 90-6113). The United States' current proposal also is impossible to square with the development of the unequivocal confrontation right at common law, *see* Petr. Br. at 14-20, 29-30, or with Justice Thomas' recent observation that it does not appear likely that "the drafters of the Sixth Amendment intended to permit a defendant to be tried on the basis of ex parte affidavits found to be reliable." *White v. Illinois,* 502 U.S. 346, 363 (1992) (Thomas, J., concurring in part and concurring in judgment).

Aside from opinions applying the *Roberts* framework itself, which obviously provide merely circular justification for the United States' proposal, the government cites only two types of confrontation cases in support of its argument: (1) cases considering the question whether defendants are always



entitled to face-to-face, as opposed to some other type, of confrontation, *see Maryland v. Craig,* 497 U.S. 836 (1990); *Coy v. Iowa,* 487 U.S. 1012 (1988); and (2) pre-*Roberts* cases discussing whether the confrontation right is "absolute," *see Chambers v. Mississippi,* 410 U.S. 284, 295 (1973) (citing *Mancusi v. Stubbs,* 408 U.S. 204 (1972), for that proposition); *Mattox v. United States,* 156 U.S. 237 (1895). But neither of these types of authority bears fruit.

First, the question whether a particular type of confrontation is acceptable is entirely distinct from whether a defendant is entitled to confrontation at all. And while the Framers' inability to foresee technological developments such as closed-circuit television generates some uncertainty as to how the Confrontation Clause ought to apply in such situations, the Framers, as well as common law and early American judges, were keenly aware that witnesses who give pretrial testimonial statements sometimes become unavailable for trial. That the Framers consistently understood the confrontation right as precluding reliability assessments under such circumstances (*see* Petr. Br. at 14-20, 29-30) shows that the Confrontation Clause's unqualified phrases "shall have the right," "all criminal prosecutions," and "the witnesses" mean what they say.

Second, every pre-*Roberts* case that states that the right to confrontation is "not absolute" does so only in the context of addressing whether the admission of a now-unavailable witness's prior testimony *that was subjected to cross-examination* contravenes the Confrontation Clause. Early cases recognized that the text of the Clause could strictly be read to prohibit the use of such incriminating testimony, *see, e.g., Mattox,* 156 U.S. at 339-40, but this Court has consistently held that the Clause incorporates the common law's "exception" allowing it. *Id.*; *Mancusi,* 408 U.S. at 213-14. This "exception" is entirely consistent with the testimonial

approach that Petitioner and the other amici advocate. Indeed, it is not really an exception at all, for it adheres to the traditional demand that all incriminating testimony be subjected to cross-examination. In no way does this prior testimony rule suggest that *Roberts'* reliability exception for untested testimony has any basis in sound principles of constitutional interpretation.[2]

In the end, the United States is asking this Court, without any real support, to abolish the half the *Roberts* framework that favors defendants, but to perpetuate the half that favors prosecutors on the ground that this half "promote[s] reliability and accuracy in criminal trials." Amicus Br. of United States at 18. But this would turn the foundations of our criminal justice system are not so one-sided. It would be outlandish to hold, for instance, that protections such as the right against self-incrimination or the right to counsel could be dispensed with simply because the judge thought that this would advance the search for truth. Even more to the point, it is an unquestioned, categorical rule that if a prosecution witness refuses to submit to cross-examination, his testimony must be struck. *See* Petr. Br. at 36. There is no inquiry under those circumstances into the testimony's reliability. There likewise should not be any such inquiry when the testimony was obtained prior to trial, with even fewer procedural protections in place.

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[2] The other Sixth Amendment cases that the United States cites in support of its position (*see* Br. at 19 n.10, 20-21), which deal with the scope of permissible cross-examination, the right to counsel, and compulsory process, are even farther afield. Those cases all deal with the *extent* of a Sixth Amendment right once it has attached. The question here, however, is whether the right to confrontation attaches at all. When faced with questions of that nature, this Court, outside of the *Roberts* framework, has never held that a constitutional guarantee does not attach simply because a trial judge thinks that the trial will nevertheless produce a reliable result.



Even if one were to accept the United States' dubious premise that courts may ignore the few rules of criminal procedure upon which the Framers insisted when those rules might impede the search for truth, it still would not follow that this Court should retain the *Roberts*' particularized guarantees test as an escape hatch from the dictates of the testimonial approach. The particularized guarantees test, as Petitioner explained at length in his opening brief, has proven in practice to be systematically incapable of separating "true" testimonial statements from misleading ones. Petr. Br. at 38-42; *see also* Amicus Br. of NACDL & ACLU at 16-22; Amicus Br. of Law Professors at 18-19. Consequently, when courts invoke the *Roberts* framework to permit the government to submit purportedly reliable testimonial hearsay, the truth-seeking process, more often than not, is subverted because the statements at issue are *not* so dependable that cross-examination truly would have been of marginal utility. *See id.* The Unites States has no answer for this problem. Furthermore, even if, as the United States hypothesizes, one sometimes could say with the certainty necessary in a criminal prosecution that a witness was trying to be honest in giving an incriminating *ex parte* statement, admitting the statement could still undermine the truth-seeking process in any number of ways. It could, for instance, allow evidence that is distorted by a witness's faulty or partial recollections, *see* Petr. Br. at 31-33; that is warped by the subconscious yet inherent pressures of criminal litigation, *id.*; or that has been altered by "an artful or careless scribe," William Blackstone, Commentaries on the Laws of England *374 (1768).

The United States never comes to grips with any of these possibilities. Once one considers them, as the creators of the common law and the Framers of our Constitution did, the propriety of the confrontation rule that "never" allows untested testimonial statements "as evidence against the [defendant]" is apparent. *United States v. Burr,* 2 F. Cas. 187, 194 (C.C. Va.

1807) (No. 14,694) (Marshall, C.J.). The alternative of permitting the courts to pass on the reliability of otherwise unacceptable testimony is simply all too similar to the approach utilized in Raleigh's trial, *see* Petr. Br. at 13-14, 30, 40 & n.10, which the United States itself acknowledges was "notorious," Amicus Br. of United States at 11 n.3, and which spurred the adoption of the confrontation right in the first instance. *See also Lilly,* 527 U.S. at 141-42 (Breyer, J., concurring).[3]

### B. *Stare Decisis* is Not an Impediment Here.

Although the State attempts to portray Petitioner's position as advocating a "wholesale abandonment" of this Court's prior confrontation jurisprudence (Resp. Br. at 10),

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[3] Retaining a rule that allows the government to introduce *ex parte* testimony when it is deemed "reliable" also subverts the judicial process's truth-seeking function in one other, somewhat more subtle, way: it undermines the incentive for law enforcement to submit pre-trial testimonial statements to adversarial testing – a process that all agree produces the best possible evidence. If, for example, law enforcement obtains an accomplice's confession and it fears that it might not be able to replicate that testimony later, the government can protect against any potential loss to the judicial process's search for truth simply by memorializing the accomplice's testimony under oath and allowing the defendant the opportunity to cross-examine her. *See, e.g.,* Fed. R. Crim. P. 15(a) (permitting pre-trial depositions "in order to preserve testimony for trial"); Wash. Crim. R. 4.6(a) (same when a prospective witness may be unavailable for trial). Yet by preserving *Roberts*' reliability-based conception of the Clause, the inducement to generate this type of "best evidence" is largely lacking. *See, e.g., Manocchio v. Moran,* 708 F. Supp. 473, 478 (D.R.I. 1989) (holding that defendant's confrontation rights were violated by admission of nontestifying state coroner's report and noting that the prosecution could have avoided this problem by deposing the coroner with the defendant present), *rev'd,* 919 F.2d 770 (1st Cir. 1990) (reinstating conviction because coroner report satisfied *Roberts*' particularized guarantees test).



principles of *stare decisis* do not, in fact, present any obstacle to abandoning the *Roberts* framework and restoring the Confrontation Clause to its traditional mode of operation. The doctrine of *stare decisis* generally is limited to requests to "overrule" precedent. *E.g., Harris v. United States,* 536 U.S. 545, 557 (2002). Here, however, this Court need not overrule any of its prior holdings in order to formally adopt the testimonial approach. *See* Petr. Br. at 22-23. Consequently, this situation is much more like that in *Sandin v. Connor,* 515 U.S. 472 (1995), where this Court, without mentioning any *stare decisis* impediment, abandoned a relatively new mode of analyzing prisoners' due process claims in a way that did not require it to overrule any prior holding. *See* Petr. Br. at 27 (elaborating on *Sandin* decision).

But even if this case did implicate *stare decisis* type principles, those principles would not stand in the way of abandoning the *Roberts* framework. This Court has explained that *stare decisis* concerns are at their nadir when adhering to recent precedent "involves a collision with prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience" and scholarly opinion. *Helvering v. Hallock,* 309 U.S. 106, 119 (1940). Indeed, "[r]emaining true to an 'intrinsically sounder' doctrine established in prior cases *better serves* the values of *stare decisis* than would following a more recently decided case inconsistent with the decisions that came before it; the latter course would simply compound the recent error and would likely make the unjustified break from previously established doctrine complete." *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 230 (1995). When faced with such situations, therefore, this Court repeatedly has held that the better course is to reinstate the prior, intrinsically sounder doctrine. *See id.* at 230-31 (overruling recent precedent that undermined cases that came before it and that "ha[d] been consistently criticized by commentators"); *United States v. Dixon,* 509 U.S. 688, 704 (1993) (overruling recent

decision that "lack[ed] constitutional roots" and was "wholly inconsistent with earlier Supreme Court precedent"); *Solorio v. United States,* 483 U.S. 435, 439-41 (1987) (overruling decision that had caused "confusion" and had broken from an earlier line of decisions "from 1866 to 1960"); *Continental T.V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36, 47-48 (1977) (overruling case that was "an abrupt and largely unexplained departure" from precedent, and which "[t]he great weight of scholarly opinion had been critical"); *Swift & Co. v. Wickham,* 382 U.S. 111, 128-29 (1965) (overruling recent decision to reinstate the "view . . . which this Court ha[d] traditionally taken" in older cases).

These same considerations are starkly present here. The *Roberts* framework, which first interjected hearsay law and the general touchstone of "reliability" into confrontation jurisprudence, is of "fairly recent vintage." *Lilly,* 527 U.S. at 140 (Breyer, J., concurring). It has never been shown to be rooted in constitutional principles, and it has been the subject of extensive scholarly criticism. *See* Petr. Br. at 26; Amicus Br. of Law Professors at 2-30. Indeed, aside from the Respondent, not one single governmental entity, defense-oriented group, or academic defends it here. Furthermore, the *Roberts* framework – as Petitioner explained in his opening brief and as the State does not dispute here – inherently leads to inconsistent and anomalous results. *See* Petr. Br. at 38-42.

In contrast, the testimonial approach – as well as its particular, unqualified prohibition against using a nontestifying accomplice's custodial statement against the accused – is grounded in centuries of precedent, dating back to the mid-1600's. *See* Petr. Br. at 12-21. It tracks all of this Court's confrontation jurisprudence into the 1970's, which consistently held that *ex parte* testimonial statements were inadmissible without any need to inquire into the statements' potential reliability, and which never suggested that the Confrontation



Clause applied outside of the testimonial context. *See* Petr. Br. at 16-21, 24-25. It also fulfils what this Court consistently has said is the primary purpose of the Confrontation Clause: to prevent defendants from being tried on the basis of *ex parte* testimony. It has been repeatedly endorsed by the federal government[4] – although the government now, unlike in past filings, qualifies its endorsement with respect to testimonial statements that courts might deem reliable – and it is supported here by the Nation's leading criminal defense and civil liberties organizations. *See* Amicus Br. of NACDL & ACLU at 22-26. Finally, extensive scholarship confirms that the testimonial approach, unlike the *Roberts* framework, is intrinsically sound and predictable in operation. *See* Petr. Br. at 26 (citing numerous articles to this effect); Amicus Br. of Law Professors at 21-22.

In all events, the time has come to restore the Confrontation Clause to its traditional operation and scope, and to abandon the *Roberts* framework in favor of the testimonial approach.

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[4] *See* Amicus Br. of United States at 7-8; Brief for United States at 17-29, *White v. Illinois,* 502 U.S. 356 (1992) (No. 90-6113); Brief for United States at 12-24, 27-28, 33-36, *United States v. Inadi,* 475 U.S. 387 (1986) (No. 84-1580).

## II. Even if this Court Applies the *Roberts* Framework Here, Sylvia's Custodial Statement Was Still Inadmissible Regardless of the Extent of its Interlocking Nature.

The State fails to advance any persuasive argument in defense of the Washington Supreme Court's "interlocking confession" holding. That holding contravenes the requirement that, in order to satisfy the *Roberts* framework, an out-of-court statement must be inherently reliable, without taking into account any other substantive evidence at trial. And even if evidence of interlock were relevant to this inquiry, the totality of the circumstances here still demonstrates that Sylvia's statement was unreliable, regardless of the extent of its interlocking nature.

### A. Whether a Suspected Accomplice's Custodial Statement Interlocks with the Defendant's Statement is Irrelevant to the Particularized Guarantees Inquiry.

Contrary to the State's argument (Resp. Br. at 5-7, 9-10), neither this Court's precedent nor "[c]ommon sense" dictates that the interlocking nature of Sylvia's custodial statement is relevant to whether the Confrontation Clause allowed its admission against Petitioner.

This Court has never upheld the admission of an accomplice's custodial confession that incriminated a criminal defendant on an "interlocking" or any other basis. In *Lee v. Illinois,* 476 U.S. 530 (1986), the case upon which the State most heavily relies, this Court held that the Confrontation Clause *prohibited* the admission of the statement at issue. And in *New Mexico v. Earnest,* 477 U.S. 648 (1986), which the State contends "confirmed the 'interlocking confession' rule" (Resp. Br. at 1, 6), this Court simply granted, vacated and



remanded a lower court decision it had held pending the outcome in *Lee.* The order did not contain any opinion from this Court, and even the concurring opinion by then-Justice Rehnquist did not elaborate on *Lee*'s analysis. Thus, contrary to the State's suggestion (Resp. Br. at 7), this Court's decision in *Idaho v. Wright,* 497 U.S. 805, 822 (1990), did not need to "overrule" *Lee* or any other case in order to put to rest that opinion's suggestion that the Confrontation Clause might permit courts to rely on the substance of a defendant's custodial statement in assessing the reliability of an accomplice's statement. Rather, the *Wright* Court merely needed to establish a rule that prohibits courts from using other evidence to bootstrap incriminating out-of-court testimony into evidence. That is exactly what the Court did.

Nor is there any justification for reading *Wright*'s anti-bootstrapping principle as applying, as the State would have it (Resp. Br. at 7), only to "physical evidence." *Wright* laid down a rule of general applicability: States may not use "other evidence at trial" to establish the trustworthiness of hearsay evidence used to convict a criminal defendant. 497 U.S. at 822. That this rule is not limited to physical evidence is confirmed by the plurality (and controlling) opinion in *Lilly.* That opinion applied *Wright* to bar the prosecution from using other witnesses' trial testimony and an accomplice's custodial and trial statements to establish the reliability of another nontestifying accomplice's custodial statement. *Lilly,* 527 U.S. at 137; *see also* Petr. Br. at 44. By the same token, the anti-bootstrapping rule precludes reliance upon Petitioner's custodial statement in assessing the reliability of Sylvia's statement.

Common sense does not dictate otherwise. Arguably corroborative oral evidence, whether it comes from the defendant or not, is no more capable than physical evidence of demonstrating a hearsay statement's reliability. To the

contrary, while physical evidence is objective and thus "inherently trustworthy," *United States v. Leon,* 468 U.S. 897, 907 (1984), and "typically reliable," *Stone v. Powell,* 476 U.S. 465, 490 (1976), oral evidence is subjective and thus susceptible to manipulation and obfuscation. Here, for example, Sylvia's first statement to the police contained "roughly the same account of the attack" as Petitioner's first statement. J.A. 3. Yet while the State contends in general that "[n]o hearsay is more reliable than" an alleged accomplice's custodial statement that interlocks with the defendant's statement, Resp. Br. at 9, it asserts in this very case that Sylvia's first interlocking statement was a "lie[]." J.A. 12. And while the State maintains that Sylvia's second statement is reliable because, like Petitioner's second statement, it is "ambiguous" on the issue of self-defense, Resp. Br. at 8, such a lack of clarity in a witness's memory or recitation regarding a critical factual matter hardly gives one confidence that her testimony is completely dependable. This Court has held, indeed, that such indistinct corroboration "poses too serious a threat to the accuracy of the verdict to be countenanced by the Sixth Amendment." *Lee,* 476 U.S. at 545.

As Petitioner explained in his opening brief, the Confrontation Clause and the hearsay exceptions that the *Roberts* framework incorporates into it are aimed at assessing the reliability of the *circumstances* under which incriminating statements are made, not the reliability of the resulting statements themselves. Petr. Br. at 45-46. The *Roberts* framework accordingly demands as a threshold matter that if incriminating testimony cannot be subjected to cross-examination, it at least must have been given with procedural and circumstantial guarantees that effectively render that preferred method of probing its accuracy and inclusiveness unnecessary. *See Lilly,* 527 U.S. at 136 (plurality opinion); *Wright*, 497 U.S. at 819. The "interlocking confession" rule that the State proposes, however, ignores this procedural nature



of the confrontation right. It attempts to rationalize the use of hearsay evidence not by reference to its inherent trustworthiness, but by comparison to other substantive evidence. This Court should resist the State's effort to strip the Confrontation Clause of its well-established, gatekeeping role regarding the procedural acceptability of hearsay evidence offered against criminal defendants.

### B. Even if Evidence of Interlock Were Relevant to the Particularized Guarantees Inquiry, the Totality of the Circumstances Still Demonstrates that Sylvia's Statement Lacks Such Guarantees of Trustworthiness.

Petitioner maintained in his opening brief that even if evidence of interlock were relevant here, Sylvia's statement was still inadmissible because the particularized guarantees test, according to this Court's precedent, requires an assessment of "the totality of the circumstances" surrounding hearsay evidence offered against criminal defendants, *Wright,* 497 U.S. at 820, and the totality of the circumstances here demonstrates that Sylvia's statement is not so reliable that cross-examination would have been of marginal utility. Petr. Br. at 46-50. The State does not contest this argument. Nor does the United States. *See* Amicus Br. of United States at 23 n.11. Accordingly, even if this Court decides to apply the *Roberts* framework here, it should still reverse the decision of the Washington Supreme Court and hold that Sylvia's statement was inadmissible.

## CONCLUSION

For the foregoing reasons, the judgment of the Washington Supreme Court should be reversed.

Respectfully submitted,

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No. 02-9410

IN THE
Supreme Court of the United States

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MICHAEL D. CRAWFORD
*Petitioner,*

v.

WASHINGTON,
*Respondent.*

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On Writ of Certiorari
to the Supreme Court of Washington

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**MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF LAW PROFESSORS SHERMAN J. CLARK, JAMES J. DUANE, RICHARD D. FRIEDMAN, NORMAN GARLAND, GARY M. MAVEAL, BRIDGET MCCORMACK, DAVID A. MORAN, CHRISTOPHER B. MUELLER, AND ROGER C. PARK, IN SUPPORT OF PETITIONER**

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# MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF LAW PROFESSORS SHERMAN J. CLARK, JAMES J. DUANE, RICHARD D. FRIEDMAN, NORMAN GARLAND, GARY M. MAVEAL, BRIDGET MCCORMACK, DAVID A. MORAN, CHRISTOPHER B. MUELLER, AND ROGER C. PARK, IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2(b), Sherman J. Clark, James J. Duane, Richard D. Friedman, Norman Garland, Gary M. Maveal, Bridget McCormack, David A. Moran, Christopher B. Mueller, and Roger C. Park respectfully move this Court for leave to file the attached brief *amicus curiae* in support of petitioner. Petitioner has granted consent, but respondent has refused consent.

This case raises important questions about the meaning of the Confrontation Clause of the Sixth Amendment to the Constitution, which is a central aspect of our criminal justice system. In particular, the second Question Presented in the petition for *certiorari* suggests that the currently prevailing

framework of doctrine under the Clause be reconsidered, to be replaced by one limiting the scope of the Clause to statements that are testimonial in nature but prescribing unequivocally that such statements may not be introduced against an accused unless he has had an opportunity to confront the maker of the statement. *Amici* are law professors who have had considerable experience dealing with the Confrontation Clause, variously writing, teaching, and litigating about it. We believe that a reconceptualization along the lines proposed by petitioner would be a great improvement in the law. Our interest in this case is not to support either prosecution or defense – in some settings the structure we propose would favor one side and in some settings the other – but to assist the placement of the Confrontation Clause on a proper footing, as expressing a rather narrow but hard-edged right.

Sherman J. Clark is Professor of Law at the University of Michigan Law School. He is the author of *An Accuser-Obligation Approach to the Confrontation Clause*, 81 NEB. L. REV. 1258 (2003), which supports and offers an explanation for the "testimonial" approach to the Confrontation Clause.

James J. Duane is Professor at Regent University School of Law. He teaches Evidence and Trial Advocacy, among other courses. He is co-author, with Glen Weissenberger, of FEDERAL EVIDENCE (4th ed. 2001). Among the topics related to confrontation on which he has written are conspirator statements and declarations against interest.

Richard D. Friedman is Ralph W. Aigler Collegiate Professor of Law at the University of Michigan Law School. He has written extensively on the Confrontation Clause, and has advocated the testimonial approach to that Clause in several articles. He is general editor of THE NEW WIGMORE: A TREATISE ON EVIDENCE, and author of THE ELEMENTS OF EVIDENCE (2d ed. 1998).

Norman M. Garland, Professor, Southwestern University School of Law, has been teaching Evidence for 32 years, first at



Northwestern University School of Law and then at Southwestern. He has authored numerous books and articles dealing with evidence, criminal law, and criminal procedure.

Gary M. Maveal is Associate Professor, University of Detroit Mercy School of Law, and has taught Evidence for 14 years. Previously, he was an Assistant United States Attorney for the Eastern District of Michigan.

Bridget M. McCormack is Associate Dean for Clinical Affairs and Clinical Professor of Law at the University of Michigan Law School. She is the co-author with Prof. Friedman of *Dial-In Testimony*, 150 U.PA. L. REV. 1171 (2002), which advocates the testimonial approach.

David A. Moran is Assistant Professor of Law at Wayne State University Law School. Previously, he was an attorney with the Michigan State Appellate Defender's Office. In that capacity, he litigated several cases highlighting the difficulties that state trial courts have in applying the *Roberts* framework . *See, e.g., Bulls v. Jones*, 274 F.3d 329 (6th Cir. 2001) (granting habeas relief where state trial court admitted non-testifying co-defendant's police statement as substantive evidence against defendant). He and Prof. Friedman are working together on a volume, part of THE NEW WIGMORE, dealing with some aspects of the law of hearsay and confrontation.

Christopher B. Mueller is the Henry S. Lindsley Professor of Procedure and Advocacy at the University of Colorado School of Law. For the last 30 years, he has taught and written about evidence law, often with Laird C. Kirkpatrick (now Dean, University of Oregon School of Law). Among the works by Mueller and Kirkpatrick are FEDERAL EVIDENCE (2d ed. 1994) (5 volumes), EVIDENCE (3d ed. 3002), MODERN EVIDENCE (2nd ed. 1999), and EVIDENCE UNDER THE RULES (4th ed. 2000). Professor Mueller has also written specifically about various aspects of hearsay, including difficulties in applying the doctrine to statements by alleged co-offenders. *See Tales Out of School, Spillover Confessions and Against-Interest*

*Statements Naming Others*, 55 UNIV. MIAMI L. REV. 929 (2001); *The Federal Coconspirator Exception: Action, Assertion, and Hearsay*, 12 HOFSTRA L. REV. 232 (1984).

Roger C. Park holds the James Edgar Hervey Chair in Litigation at Hastings College of the Law, University of California. He was a member of the faculty of the University of Minnesota Law School for more than twenty years. Many of his law review articles focus on hearsay evidence, some of them from an empirical standpoint. Among his numerous books on evidentiary topics is CASES AND MATERIALS ON EVIDENCE (9th ed. 1999, with Jon R. Waltz).

Because we believe that current doctrine undervalues the significance of the confrontation right in our constitutional scheme, and we believe this case offers an opportunity to redress the situation, we respectfully seek leave to file the attached brief *amicus curiae*.

Respectfully submitted,

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## INTERESTS OF AMICI CURIAE[1]

The interest of *amici* is set forth in the accompanying motion for leave to file this brief *amicus curiae*.

## STATEMENT OF THE CASE

We adopt the statement of the case in the petitioner's brief, with these additional comments. Like *Lee v. Illinois*, 476 U.S. 530 (1986), and *Lilly v. Virginia*, 527 U.S. 116 (1999), this case is an example of what might be called station-house testimony. Sylvia Crawford, the petitioner's wife, made a tape-recorded statement to investigating officers at the police station on the night of the alleged crime. Sylvia was unwilling to testify at trial against her husband, and was deemed by all parties to be unavailable as a witness. Over petitioner's objection, Sylvia's statement was introduced, and petitioner was convicted. *Amici* file this brief to address the second Question Presented in the petition for *certiorari*:

> Whether this Court should reevaluate [the] Confrontation Clause framework established in *Ohio v. Roberts*, 448 U.S. 56 (1980), and hold that the Clause unequivocally prohibits the admission of out-of-court statements insofar as they are contained in "testimonial" materials, such as tape-recorded custodial statements.

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[1] No counsel for any party authored any part of this brief. Part of the cost of preparing and submitting this brief was paid for by research funds provided by the University of Michigan Law School to Richard Friedman and under his control. The brief does not necessarily reflect the views of that Law School or of any of its faculty other than *amici curiae*. Except as just noted, no persons or entities other than the *amici curiae* made any monetary contribution to the preparation or submission of this brief.

## SUMMARY OF ARGUMENT

By granting *certiorari* in this case, the Court has created an opportunity to replace an unsatisfactory conception of the Confrontation Clause with one that is historically well grounded, textually faithful, intuitively appealing, and straightforward in application. This conception confines the Clause to its proper sphere and at the same time makes clear the place of the confrontation right as one of the fundamental cornerstones of our system of criminal justice. Adopting this conception will also make the law far easier than current doctrine for the lower courts to follow, because the Confrontation Clause decisions of this Court will be explained by reference to a robust, easily understood principle with deep roots in the Anglo-American tradition and, indeed, throughout Western jurisprudence. This principle is that the testimony of a witness may not be used against an accused unless it was given under the conditions prescribed for testimony, among which are that it be under oath or affirmation, that it be given in the presence of the accused, and that it be subject to cross-examination.

Implementation of the principle requires recognition that a statement may be testimonial in nature even though it was not made under the conditions prescribed for testimony. Thus, a statement made knowingly to authorities accusing another person of a crime is clearly a testimonial statement – even though it was made without oath or cross-examination and in the presence of no one but the authorities. If a report by the authorities of a statement made in this way may be considered by the trier of fact, then a system has been created that tolerates the giving of testimony behind closed doors. The very point of the Confrontation Clause was to prevent the creation of such a system. That a statement was made absent the conditions required by the system for testimony does not render the statement non-testimonial in nature – rather, if the statement



was testimonial in nature, the absence of those conditions renders the testimony intolerable. Put another way, the Confrontation Clause gives the accused more than a right to confront "all those who appear and give evidence at trial." *California v. Green*, 399 U.S. 149, 175 (1970) (Harlan, J., concurring). Its primary impact is to ensure that prosecution witnesses *do* give their evidence at trial, or if necessary at a pretrial proceeding at which the accused is able to confront them.

Like the right to counsel and the right to a jury trial, the right to confront witnesses is subject to waiver, and it is also subject to forfeiture, for the accused has no ground to complain if his own wrongdoing caused his inability to confront the witness. Like those other rights, the right to confront adverse witnesses can and should be applied unequivocally. That is, if the statement is a testimonial one and the right has not been waived or forfeited, then the right should apply without exceptions. This simple approach is possible because the scope of the right, properly conceived, is quite narrow. It does not reach out-of-court statements in general, but only those that are testimonial in nature.

Under the currently prevailing doctrine, by contrast, the scope of the Clause is extremely broad: Any hearsay statement made by an out-of-court declarant is presumptively excluded by the Clause. A flat exclusionary rule of such breadth would be impractical, and so the doctrine exempts from the presumptive rule many statements that are deemed to be reliable – purportedly so reliable that cross-examination would be of little value. Statements that fit within "firmly rooted" hearsay exceptions are deemed reliable without more. Just which of the many hearsay exceptions – a term used in this brief to cover both exceptions proper to the rule against hearsay and exclusions from the definition of hearsay – are considered to be "firmly rooted" is a question that this Court has only partially resolved. On an ad hoc basis, the Court has declared hearsay

exceptions, or parts of them, either within that category or not, but the Court has never offered a clear set of criteria for determining what makes an exception "firmly rooted." If a statement does not fit within a "firmly rooted " exception, it may yet satisfy the reliability requirement, if the statement is deemed to have "individualized guarantees of trustworthi[illegible]." This standard is heavily fact-bound and demands case-by-case review. Even if a statement is deemed reliable, the Confrontation Clause may bar its use if the declarant is available to be a witness. As with reliability, the criteria for the unavailability requirement are unclear. If the statement falls within the exception for former testimony, the declarant must be unavailable or the Clause will preclude its use; if the statement falls within the exceptions for spontaneous declarations, statements made for purposes of medical treatment, and conspirator declarations, unavailability is not required; in other contexts it is not yet known whether the unavailability requirement applies.

This framework is unpredictable and over-complicated, and so it too frequently yields very bad results in the lower courts. The framework is capable of producing good results; indeed, adopting the approach proposed in this brief would not require the Court to overrule any of its Confrontation Clause decisions. But the existing framework reaches good results consistently only if it is manipulated. In this respect, it resembles the Ptolemeian astronomical system. That system, too, was capable of yielding good results, but only if it was manipulated and made ever more complex to ensure that its results matched empirical observations. Ultimately, then, the system failed to explain coherently the phenomenon it was trying to describe. Because the system's predictive power was thus limited, it became necessary to adopt a new organizing principle. In the confrontation context, too, a new organizing principle is necessary: rather than treating the Confrontation Clause as a generalized attempt to exclude unreliable hearsay



evidence, the Court should recognize that the Clause is a guarantee that *testimony* offered against an accused must be given in the manner prescribed for centuries, in the presence of the accused and subject to cross-examination.

## ARGUMENT

### I. THE TEXT OF THE CONFRONTATION CLAUSE SUPPORTS A TESTIMONIAL APPROACH TO THE CLAUSE, AND NOT THE *ROBERTS* FRAMEWORK.

We begin with the text of the Confrontation Clause. It provides in simple terms:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.

Now compare how this language squares respectively with the prevailing framework established by *Roberts* and with the testimonial approach proposed here. The prevailing framework was laid out by *Roberts*, 448 U.S. at 66. As subsequently modified, it has these principal elements:

1. *"[W]hen a hearsay declarant is not present for cross-examination at trial," use of the hearsay declaration is presumptively barred by the Confrontation Clause.* The basic definition of hearsay, as expressed in Federal Rule of Evidence 801(c), is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." The text of the Confrontation Clause does not refer to hearsay, however, and nothing in it suggests that its scope is as broad as the definition of hearsay. A person who makes a statement in the ordinary course of her affairs, without any reasonable anticipation of

litigation, is a hearsay declarant if the statement is later offered at trial to prove the truth of what it asserts, but it would be an unnatural reading to conclude that this makes her a "witness" within the meaning of the Confrontation Clause.

2. *Even though it is hearsay, an out-of-court statement may be admitted against an accused (subject to the possible applicability of an unavailability requirement) if it is sufficiently reliable. Under this doctrine, statements are deemed reliable if the evidence either "falls within a firmly rooted hearsay exception" or "contains 'particularized guarantees of trustworthiness' such that adversarial testing would be expected to add little, if anything, to the statements' reliability."* *Lilly*, 527 U.S. at 124-25, *quoting in part Roberts*, 448 U.S. at 66. Nothing in the text of the Confrontation Clause, however, suggests that if a statement falls within the scope of the Clause its use against the accused may yet be allowed because of a judicial determination that the statement is reliable. The Clause says that in *all* criminal prosecutions the accused shall enjoy the right to be confronted with *the* witnesses against him, not simply those whom judges deem sufficiently unreliable to warrant cross-examination. The Clause contains no hint of a reliability test, and no suggestions of exceptions to its categorical bar.[2]

In short, the *Roberts* framework depends on a set of concepts – hearsay, reliability, and exceptions – none of which

[2] As originally articulated by *Roberts*, the framework also generally precluded use of hearsay unless the declarant was unavailable to testify at trial. Subsequent cases have cut back on this requirement. It applies to former testimony, as in *Roberts* itself; it has been held not to apply to statements falling within the exceptions for conspirator statements, *United States v. Inadi*, 475 U.S. 387 (1986), spontaneous declarations, and statements made in the course of receiving medical care, *White v. Illinois*, 502 U.S. 346 (1992). In other contexts its applicability is unclear.



is supported by the text of the Confrontation Clause.

In contrast, that text squares very well with the testimonial approach, the core of which may be expressed as follows:

> Use against an accused of the statement of a witness – that is, a statement that is testimonial in nature – violates a right of the accused unless the accused has or has had an adequate opportunity to confront the witness.[3]

The key aspect of this approach is equating a witness with a person who makes a testimonial statement. But that is a very natural reading. The Latin for witness is *testis*. Adolf Berger, *Encyclopedic Dictionary of Roman Law*, 43, Pt. 2 TRANS. AM. PHIL. SOC. 335, 735 (1953). That word shares a root with *testimonium*, the core meaning of which is "the testimony of a witness." *Id.* And that, of course, is the source of the English word testimony. The derivation appears to be through the Old French, 17 THE OXFORD ENGLISH DICTIONARY 833 (2d ed. 1989); thus, in the modern French witness is *témoin* and testimony is *témoinage*.

Of course, to give this approach life, it is necessary to invest the word *testimonial* with meaning. As discussed in Part IV, there is some ambiguity about the edges of the word's meaning.[4] For now, though, it suffices to say that a statement

[3] A subsidiary principle is that if the accused has had an adequate opportunity to confront the witness at an earlier time but, without fault of the prosecution, the witness is unavailable to testify at trial, then the witness's prior statement may be used. Part IV contrasts this principle and the unsatisfactory method by which the prevailing framework treats unavailability.

[4] The same can be said about the term *confront*. In most cases, the meaning is clear: The witness must testify in the presence of the accused, subject to cross-examination. Questions such as when or

that is made with the reasonable anticipation that it will be used in a criminal prosecution should be considered testimonial, while a statement that is made in the ordinary course of affairs, with no prospect of evidentiary use in the offing, is not testimonial.

The text of the Confrontation Clause is important in this context not only because of its intrinsic authority but also because, as we will now show, it expresses a fundamental principle with deep historical roots: A witness may not testify against an accused unless she confronts him with the testimony.

## II. THE HISTORY UNDERLYING THE CONFRONTATION CLAUSE SUPPORTS A TESTIMONIAL APPROACH TO THE CLAUSE, AND NOT THE *ROBERTS* FRAMEWORK.[5]

If an adjudicative system is rational, then it must rely in large part on the testimony of witnesses and prescribe the conditions under which they may testify. For many systems, one such condition is that testimony must be given under oath. Another common condition, characteristic of the common law system but not limited to it, is that testimony of a prosecution witness must be given in the presence of the accused, subject to questioning by him or on his behalf. The ancient Hebrews required confrontation, Deut. 19:15-18, as did the Romans. A

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whether the witness and the accused may be in different rooms but connected by a video transmission, *see, e.g., Maryland v. Craig*, 497 U.S. 836 (1990), or whether the accused's opportunity to cross-examine was adequate, *see, e.g., United States v. Owens*, 484 U.S. 554 (1988), are not presented by the current case.

[5] A more extensive historical discussion, with fuller citations, is in Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U.PA. L. REV. 1171, 1202-09 (2002).



Roman governor, Festus, pronounced: "It is not the manner of the Romans to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges." Acts, 25:16.

Once the irrational methods of medieval adjudication, such as trial by ordeal and by battle, withered away, Western legal systems developed different approaches to testimony. Continental systems tended to take testimony on written questions – behind closed doors and out of the presence of the parties – for fear that the witnesses would be coached or intimidated. By contrast, beginning in the 15th century and continuing for centuries afterwards, numerous English judges and commentators – John Fortescue, Thomas Smith, Matthew Hale, and William Blackstone among them – praised the open and confrontational style of the English criminal trial. In a celebrated 16th century description, for example, Smith spoke approvingly of an "altercation" between accuser and accused. Nearly two centuries later, Sollom Emlyn proclaimed: "In other Countries, the Witnesses are examin'd in private, and in the Prisoner's Absence; with us, they are produced face to face, and deliver their Evidence in open Court, the Prisoner himself being present, and at liberty to cross-examine them." And later in the 18th century Blackstone spoke of "the confronting of adverse witnesses" as being among the advantages of "the English[] way of giving testimony, *ore tenus*" – that is, by word of mouth, or orally.

To be sure, the norm of confrontation was not always respected. First, a set of courts in English followed continental procedures rather than those of the common law. Precisely for that reason, they were politically controversial, and most of them (notably the Court of Star Chamber), being viewed as arms of an unlimited royal power, did not survive the upheavals of the 17th century. The equity courts did survive, but without criminal jurisdiction, and well before the end of that century the common law courts had a sophisticated body of doctrine

governing when depositions taken in equity, subject to cross-examination on written questions, could be used in lieu of testimony at trial because the witness was unavailable.

Second, justices of the peace were required by statute to examine felony witnesses, and these examinations were admissible at trial, even though the witness had not been cross-examined, if the examination was taken under oath and the witness was then unavailable. This treatment – which almost certainly was one of the chief abuses at which the Confrontation Clause was aimed – was a continuing source of controversy, and in 1696, in the celebrated case of *Rex v. Paine*,[6] the court refused to extend it to misdemeanor cases; eventually, the practice was abolished by statutes for felony cases as well.

Finally, and perhaps most significantly, in politically charged cases the Crown, trying to control its adversaries through the criminal law, sometimes used testimony taken out of the presence of the accused. Thus, the battle for confrontation was most clearly fought in the treason cases of Tudor and Stuart England. Even early in the 16th century, treason defendants demanded that witnesses be brought before them; often they used the term "face to face." Sometimes these demands were heeded, but what is most notable is that they found recurrent legislative support, acts of Parliament repeatedly requiring that accusing witnesses be brought "face to face" with the accused. By the middle of the 17th century, the battle was won, and courts routinely required that treason witnesses testify before the accused and be subjected to questioning by him.

The notorious case of Walter Raleigh was one of many in which Crown prosecutors used confessions made by alleged accomplices of the accused even though the confessions were not made under oath or before the accused; the self-accusing

[6] 87 Eng. Rep. 584, 90 Eng. Rep. 527, 90 Eng. Rep. 1062, 91 Eng. Rep. 246, 91 Eng. Rep. 1387 (K.B. 1696).



nature of such statements was said to be an adequate substitute for the usual requirements of testimony. But in 1662, the judges of the King's Bench ruled unanimously and definitively in *Tong's Case* that a pretrial confession "cannot be made use of as evidence against any others" than the confessor himself.[7]

The confrontation right naturally found its way to America. There, the right to counsel developed far more quickly than in England, and with it an adversarial spirit that made confrontation especially crucial. The right became a particular focus of American concerns in the 1760s when the Stamp Acts and other Parliamentary regulations of the colonies provided for the examination of witnesses upon interrogatories in certain circumstances. Not surprisingly, the early state constitutions guaranteed the confrontation right. Some used the time-honored "face to face" formula; others, following Hale and Blackstone, adopted language strikingly similar to that later used in the Sixth Amendment's Confrontation Clause.

This account has not mentioned reliability. Though one of the advantages perceived for confrontation was its contribution to truth-determination, the confrontation right was not considered contingent, inapplicable upon a judicial determination that the particular testimony was unreliable.

Similarly, the law against hearsay has not played a role in this account. Hearsay law, like evidence law more generally, was not well developed at the time the Clause was adopted, much less during the previous centuries. In expressing a fundamental procedural principle governing how testimony must be given, the Clause was not meant to constitutionalize the law of hearsay. The *Roberts* framework is a latter-day construct, with no historical roots.

Thus, recent developments under the European Convention on Human Rights are noteworthy. The Convention contains

[7] *Case of Thomas Tong*, 84 Eng. Rep. 1061, 1062 (K.B. 1662), *cited in Lilly*, 527 U.S. at 141 (Breyer, J., concurring).

nothing resembling a hearsay rule, of course, because most of the judicial systems falling under it do not have hearsay law. But Articles 6(1) and 6(3)(d) of the Convention contain, respectively, a general protection of a criminal defendant's right to a fair trial and a specific protection of his right "to examine or have examined witnesses against him." Under these provisions, the European Court of Human Rights has issued a series of decisions establishing a right of confrontation, which it has referred to as such.[8] Thus, the confrontation right, which gained its strongest recognition in the common law system but long predated it, is once again a fundamental part of Western jurisprudence.

## III. THE TESTIMONIAL APPROACH REFLECTS VALUES WARRANTING CONSTITUTIONAL PROTECTION, AND THE *ROBERTS* FRAMEWORK DOES NOT.

Securing testimony by a declarant, face-to-face with an accused, nearly always has some benefits in comparison to mere presentation of a prior statement by that declarant. But only when the prior statement was itself testimonial in nature is there justification for a systematic constitutional rule rejecting use of the statement, even if the declarant is unavailable to be a witness, if the accused has not had an opportunity to confront her.

When the prosecution offers an ordinary hearsay statement, made without any anticipation of evidentiary use, it will often be better, taking into account considerations of truth determination and cost, to admit the statement rather than to

[8] *E.g., Saïdi v. France*, 17 E.H.R.R. 251, 270 (1993) ("Neither at the stage of the investigation nor during the trial was the applicant able to examine or have examined the witnesses concerned. The lack of any confrontation deprived him in certain respects of a fair trial").



exclude it. Considering just truth determination, live testimony of the declarant, perhaps supplemented by the hearsay statement, is presumably preferable to presentation of the hearsay statement alone. But sometimes the declarant cannot be feasibly produced as a witness, and so the choice is between admitting the statement and hearing nothing from the declarant. If the statement is significantly probative and not particularly prejudicial, which is true of much hearsay, it is better to admit it than to exclude it. And even if it would be possible to produce the declarant as a witness, the marginal benefits of insisting that this be done might not be worth the cost of doing so.

But whether such a non-testimonial hearsay statement should or should not be admitted is, of course, a matter of local evidentiary law. If a particular jurisdiction concludes that the probative value of such hearsay statements outweighs the prejudicial effect, either categorically or on a case-by-case basis, that jurisdiction should not be precluded by the Confrontation Clause from allowing such statements into evidence. Conversely, if the particular jurisdiction concludes that such statements should not be admitted, that choice is also entitled to respect. By decoupling the Confrontation Clause from the minutiae of the hearsay rules, the testimonial approach would allow each jurisdiction to make its own determination as to what non-testimonial hearsay should be admitted in criminal cases.

Now consider the situation in which the prior statement was testimonial – that is, made with reasonable anticipation of evidentiary use. In this context, the same factors continue to weigh, and with additional force, against admission of the prior statement if the accused has not had an opportunity to confront the declarant. But additional factors apply as well. The fundamental difference is this: When the statement is testimonial, the question is not simply an evidentiary one, whether the particular statement should be included in the body

of information presented to the trier of fact. Rather, there is now a basic procedural issue, of how testimony against an accused shall be given. And there is no doubt that the constitutional demand is that such testimony be given face to face with the accused, subject to cross-examination. *Cf. Lilly*, 527 U.S. at 142 (Breyer, J., concurring), *quoting Maryland v. Craig*, 497 U.S. 836, 862 (1990) (Scalia, J., dissenting) ("[T]he Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to assure reliable evidence, undeniably among which was 'face-to-face' confrontation"). Insisting on such confrontation as the required method for giving testimony serves several important instrumental purposes:

• Confrontation guarantees openness of procedure, which among other benefits ensures that the witness' testimony is not the product of torture or of milder forms of coercion or intimidation. This is particularly important given the contrast to early continental systems, in which coercion of witnesses examined privately was very common.

• Confrontation provides a chance for the defendant, personally or through counsel, to dispute and explore the weaknesses in the witness' testimony. In Thomas Smith's day that chance came in the form of a wide-open altercation. Today it comes in the form of cross-examination, usually through counsel. The Court has repeatedly endorsed Wigmore's characterization of cross-examination as "beyond any doubt the greatest legal engine ever invented for the discovery of truth."[9]

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[9] 5 JOHN H. WIGMORE, EVIDENCE § 1367, p. 32 (James Chadbourn rev. 1974), *quoted in part in Lilly*, 527 U.S. at 123 (plurality opinion); *White*, 502 U.S. at 356; *Craig*, 497 U.S. at 844 ; *Perry v. Leeke*, 488 U.S. 272, 283 n.7 (1989); *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987); *Green*, 399 U.S. at 158; *Ford v. Wainwright*, 477 U.S. 499, 415 (1986); *Lee*, 476 U.S. at 540; *Watkins v. Sowders*, 449 U.S. 341, 348 n.4 (1981); *Roberts*, 448 U.S. at 63



Of course, as Wigmore recognized, cross-examination may sometimes lead the trier of fact away from the truth rather than towards it. But the constitutionally required "beyond a reasonable doubt" standard of persuasion in a criminal case reflects the extreme disutility of a false conviction. *See In re Winship*, 358 361-64 (1970). The same consideration demands that the accused be able to cross-examine adverse witnesses even if sometimes that requirement prevents the conviction of a guilty person.

• Confrontation discourages falsehood as well as assists in its detection. The prospect of testifying under oath, subject to cross-examination, and in the presence of the accused makes false accusation much more difficult than it would be otherwise. *Craig*, 497 U.S. at 846; *Coy v. Iowa*, 487 U.S. 1012, 1019- 20· (1988) ("It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.').[10]

• If, as is usually the case, the confrontation occurs at trial or in a videotaped proceeding, the trier of fact has an

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n.6; *cf. United States v. Salerno*, 505 U.S. 317, 328 (1992) (Stevens, J., dissenting) ("Even if one does not completely agree with Wigmore's assertion . . . one must admit that in the Anglo-American legal system cross-examination is the principal means of undermining the credibility of a witness whose testimony is false or inaccurate.").

[10] *See also* Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1490 (1999) ("The witness whose credibility would be destroyed by cross-examination will not be called at all or will try to pull the sting of the cross-examiner by acknowledging on direct examination the facts that a cross-examiner could be expected to harp on."). Of course, the same prospect may deter the giving of truthful testimony. But, again, the tradeoff accords with the fundamental value underlying the "beyond a reasonable doubt" standard. *Craig*, 497 U.S. at 846-47; *Coy*, 487 U.S. at 1020.

opportunity to assess the demeanor of the witness. *Craig,* 497 U.S. at 844; *Mattox v. United States*, 156 U.S. 237, 242-43 (1895) (confrontation gives the accused the opportunity "of compelling [the witness] to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.").

● Confrontation eliminates the need for intermediaries, and along with it any doubt about what the witness's testimony is.

Beyond these instrumental purposes, confrontation serves a "strong symbolic purpose" – again, one that has substantial force only when the prior statement is testimonial – that has been repeatedly recognized by this Court. *Craig,* 497 U.S. at 846; *Lee,* 476 U.S. at 540. Even if confrontation had no impact on the quality of prosecution evidence, it would be important to protect because, as the Court said in *Coy* and repeated in *Craig*, "there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'" It is not only fairness to the accused that is at stake, but also the moral responsibility of witnesses and of society at large, for "requiring confrontation is a way of reminding ourselves that we are, or least want to see ourselves as, the kind of people who decline to countenance or abet what we see as the cowardly and ignoble practice of hidden accusation." Sherman J. Clark, *An Accuser-Obligation Approach to the Confrontation Clause*, 81 NEB. L. REV. 1258 (2003).

The symbolic value of confrontation is enhanced by the historical background that we have reviewed in Part II of this brief. Indeed, even if confrontation served no other value at all, it would be important to honor the right that accused persons have had for many centuries governing how witnesses against them may testify. Like Festus, we can say that it is not our way to allow an accused to be convicted of a crime without his having had a chance to have the witnesses against him testify to his face.



These symbolic and historic functions, as well as the instrumental values achieved by making confrontation the prescribed method for giving testimony, refute the notion that the confrontation right may be abrogated on a case-by-case basis. That is, it would be inappropriate to hold that confrontation is unnecessary in a given case because the quality of the particular witness's testimony is good enough even without confrontation. The Sixth Amendment does not provide that if the quality of the prosecution evidence in a given case is good enough then we may dispense with the right to jury or the right to counsel. The right to confront adverse witnesses should be treated the same way.

Indeed, this is clearly the rule with respect to in-court witnesses. Suppose a prosecution witness gives significant direct testimony at trial but that the accused, through no fault of his own, has no opportunity to cross-examine – perhaps the witness dies or simply refuses to answer the accused's questions. The direct testimony must be struck, without regard to its reliability.[11] There is no reason why the rule should be different with respect to a witness who makes a testimonial statement out of court but then fails, for reasons other than the accused's wrongdoing, to testify at trial. Such testimony should not be allowed to help convict the accused.

The testimonial approach, then, reflects a basic principle that is central to our system of criminal justice. The *Roberts* framework, by contrast, does not implement values warranting constitutional protection. That approach purports to make reliability, or trustworthiness, the crucial consideration. But the

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[11] *See, e.g., Toogood v. Borg*, 828 F.2d 571, 572-73 (9th Cir. 1987) (explaining that when a prosecution witness cannot or will not submit to cross-examination, the direct testimony is struck, but that if this is inadequate a mistrial is required).

enterprise is misguided. *See, e.g.*, Eleanor Swift, *Smoke and Mirrors: The Failure of the Supreme Court's Accuracy Rationale in White v. Illinois Requires a New Look at Confrontation*, 22 CAP. U. L. REV. 145, 148 (1993) ("The Court's accuracy rationale is the product of smoke and mirrors, rather than of a realistic analysis of the values underlying confrontation.").

A trial is not, and as a practical matter cannot be, limited to trustworthy evidence. Indeed, were there truly trustworthy evidence with respect to a given factual issue, the issue would not have to be tried at all, or at least the outcome would be virtually a foregone conclusion. In a trial all sorts of evidence that taken alone might be very *un*trustworthy is presented to the trier of fact. This includes the live testimony of witnesses testifying from personal knowledge and subject to cross-examination – the paradigm of acceptable evidence and yet a species that is often highly unreliable. *See, e.g., United States v. Wade*, 388 U.S. 218 (1967); ELIZABETH F. LOFTUS & JAMES M. DOYLE, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL (3d ed. 1997). The trier of fact must assess all the evidence, and even though the individual items may be unreliable the evidence may be enough in the aggregate to support a finding of proof beyond a reasonable doubt.

Nevertheless, the perception has arisen that only if hearsay is sufficiently reliable is it safe to dispense with the usual requirement of cross-examination. *See Lilly,* 527 U.S. at 123 (plurality opinion, speaking of statements containing guarantees of trustworthiness "such that adversarial testing would be expected to add little, if anything, to the statements' reliability"). The perception is unfounded empirically. There is no good support for the conclusion that jurors tend systematically to over-value hearsay, and in some settings they seem to *under*-value it. Roger C. Park, *Visions of Applying the Scientific Method to the Hearsay Rule*, MICH. ST. DCL L. REV. (2003, forthcoming). To the extent that the "mission" of the



Confrontation Clause is to "advance the accuracy of the truth-determining process in criminal trials," *Tennessee v. Street,* 471 U.S. 409, 415 (1985) (citation and internal quotation marks omitted), the attempt to exclude hearsay not deemed sufficiently reliable is self-defeating.

Moreover, the doctrine that proceeds from this attempt is unworkable. Suppose that the doctrine were taken literally, and hearsay were allowed only "if the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility." *Idaho v. Wright*, 497 U.S. 805, 820 (1990). If this standard were applied conscientiously, very few statements would meet it – and there is no ground for confidence that hearsay law would identify them. For example, it is self-evident that statements by conspirators in furtherance of their criminal enterprise, admissible in federal court pursuant to Fed. R. Evid. 801(d)(2)(E), are not a particularly trustworthy class of assertions. *See* 4 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE 295 (2d ed. 1994) ("the case for reliability is at best marginal"). Similarly, consider which of the following is more likely to reflect a reasonable assessment by defense counsel when a dying declaration is admitted, pursuant to rules like Fed. R. Evid. 804(b)(2): (1) "If only I could cross-examine the declarant, I could explore whether she really had an opportunity to observe her assailant, whether her mind was clear at the time she accused my client, and whether she had a grudge against him," or (2) "It doesn't matter that I couldn't cross-examine. She knew she was about to die when she spoke, and no one would want to meet with her Maker with a lie on her lips, *see Wright,* at 820, so I couldn't have done a thing with her." We do not contend that such statements should always be excluded – but only that they should not be admitted on the clearly false ground that they are reliable.

Finally, it is singularly inappropriate for the adjudicative system to say to an accused, in effect, "Yes, it is true that you

did not get a chance to question this witness. But we have concluded that this does not matter, because the statement was so reliable that cross-examination would have made very little difference." Such a ruling ignores not only the human values underlying the Confrontation Clause but also the defend[illegible]'s right to present his case to, and to attempt to persuade, the [illegible]er of fact.

In sum, the Confrontation Clause is meant not to ensure that only reliable evidence is presented at trial but to guarantee the traditional principles by which testimony is given. This proposition points the way to the manner in which the Clause can be implemented faithfully and practically.

## IV. AS COMPARED TO THE *ROBERTS* FRAMEWORK, THE TESTIMONIAL APPROACH GIVES BETTER GUIDANCE TO THE LOWER COURTS, IS MORE PRACTICAL TO IMPLEMENT, AND IS LESS SUSCEPTIBLE TO MANIPULATION.

The testimonial approach can be articulated in terms of four basic questions.

*First, was the statement testimonial in nature?* The statement falls within the scope of the Confrontation Clause if and only if the answer is affirmative. This question can be made operational in various ways. One practical possibility is an objective test that would ask: Would a reasonable person in the declarant's position anticipate that the statement would likely be used for evidentiary purposes? Adoption of the testimonial approach in this case does not require marking out the precise bounds of the class of testimonial statements because here, as in most cases, the exact wording of the test would not be decisive. It is clear that Sylvia Crawford's statement to the police was testimonial, under any reasonable approach. The statement was electronically recorded by the police in a police station after the incident at issue. The



recording was made with considerable ceremony, clearly for use in later proceedings, and Ms. Crawford spoke in response to questioning much as if in a deposition – but without oath or cross-examination. If statements made in such circumstances are allowed as proof at trial, then under any plausible view the declarant is testifying when she makes such a statement, for there is no doubt that a reasonable person in her position would anticipate that her statements would likely be used as evidence in a future criminal proceeding.

Just as in this case, the question of whether a given statement should be considered testimonial can usually be rather easily resolved, as indicated by the following "rules of thumb," *see* Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1040–43 (1998). A statement made knowingly to the authorities that describes criminal activity is almost always testimonial. A statement made by a person claiming to be the victim of a crime and describing the crime is usually testimonial, whether made directly to the authorities or not. If, in the case of a crime committed over a short period of time, a statement is made before the crime is committed, it almost certainly is not testimonial. A statement made by one participant in a criminal enterprise to another, intended to further the enterprise, is not testimonial. And neither is a statement made in the course of going about one's ordinary business, made before the criminal act has occurred or with no recognition that it relates to criminal activity.

Thus, testimonial statements include not only statements made as testimony at the trial itself, *see Coy*; *Craig*, but also testimony given at a prior trial, *see Mattox*; *Mancusi v. Stubbs*, 408 U.S. 204 (1972); or other judicial proceeding, *see Pointer v. Texas*, 380 U.S. 400 (1965); *Barber v. Page*, 390 U.S. 719 (1968); *Green*; *Roberts*, and statements, like the one in this case, knowingly made to investigating authorities, *see Douglas v. Alabama*, 380 U.S. 415 (1965); *Green*; *Lee*; *Lilly*; *United*

*States v. Owens*, 484 U.S. 554 (1988). At the other end, some statements, including those made in furtherance of a conspiracy, *see United States v. Inadi*, 475 U.S. 387 (1986); *Bourjaily v. United States*, 483 U.S. 171 (1987), can be rather easily deemed non-testimonial, because they were made absent any indication of evidentiary use, *see Dutton v. Evans*, 400 U.S. 74 (1970), and these do not raise a concern under the Confrontation Clause (though other bodies of law, including the jurisdiction's hearsay law, may require exclusion). Inevitably, some cases remain near the borderline,[12] but that fact itself is not troublesome.

Assuming the statement was testimonial, so that the declarant should be deemed to have been acting as a witness in making it, then the accused had a right to confront the witness. The second basic question, then, is: *Will the accused have had an adequate opportunity to confront the witness?* In some settings, this question poses interesting issues, such as whether the witness may testify via an electronic connection to the

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[12] *See, e.g., Wright*; *White*; Friedman & McCormack, *supra*, 150 U. PA. L. REV. at 1241-43. *Amici* candidly acknowledge that statements by young children will present some of the closest issues under the testimonial approach, just as they do in the current framework. Pre-trial statements by children to care-givers such as parents and physicians may be considered non-testimonial in some circumstances even though statements by adults in similar circumstances would likely be considered testimonial. Depending on the context, the statement of a very young child of limited understanding might be considered for purposes of the Confrontation Clause to be more like the barking of a dog, and so non-testimonial, than like the accusatory statement of an adult. A statement by a child in response to questioning by a police officer or physician to whom the child has been referred because of suspicions of abuse is more likely to be testimonial than is a spontaneous statement by the child before abuse has been suspected. *See generally* Richard D Friedman, *The Conundrum of Children, Hearsay, and Confrontation*, 65 LAW & CONTEMP. PROBS. 243, 249-52 (Winter 2002).



courtroom, *see Craig*,[13] whether an opportunity to cross-examine at as preliminary hearing suffices for purposes of the Confrontation Clause, *Green*, or whether the witness's memory loss at the time of cross-examination unduly impairs the accused's confrontation opportunity. *Owens*. Usually, though, the answer to this question is clear, as it was, for example, in *Pointer*, *Douglas*, *Lee*, and *Lilly*, and as it is here; Michael Crawford did not have an opportunity to cross-examine Sylvia.

If the accused will not have had an adequate opportunity to confront the witness, then introduction of the testimonial statement to prove the truth of what it asserts[14] violates the accused's confrontation right unless the answer to the third question is in the affirmative: *Did the accused waive the right to confrontation by failing to object, or forfeit it by misconduct?*[15] The accused might forfeit the right, for example,

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[13] *See also* Statements of Scalia, J., 535 U.S. 1159, and of Breyer, J., dissenting, 535 U.S. 1162, in conjunction with the decision not to transmit to Congress a proposed amendment to Fed. R. Crim. P. 26 (2002).

[14] *Cf. Tennessee v. Street*, 471 U.S. 409 (1985) (no confrontation violation where statement was not introduced to prove the truth of what it asserted).

[15] In the Washington appellate and supreme courts, but not in opposing *certiorari*, the State contended that petitioner, who strenuously asserted his confrontation right, nevertheless forfeited it by invoking marital privilege to keep Sylvia from testifying at trial. Even assuming that absent an assertion of privilege by petitioner Sylvia would have testified at trial – which does not appear to be true – petitioner clearly did not commit misconduct by asserting a right the State granted to him as a matter of law, and so the state courts correctly rejected the forfeiture argument. *Cf.* Fed. R. Evid. 804(b)(6) (providing for forfeiture of hearsay objection by "wrongdoing"); *Green v. United States*, 355 U.S. 184 (1957)

by intimidating the witness, kidnapping her, or murdering her. An accused cannot complain about his inability to confront the witness if it is his own wrongful conduct that created that inability. This principle – rather than the fiction that cross-examination would be practically useless anyway because a declarant would not to die with a lie on her lips – best explains the admissibility of certain statements by dying witnesses.[16]

If the testimonial statement was made at an earlier time, and the accused then had an adequate opportunity to confront the w: ness, a fourth question arises: *Has the witness been shown to be unavailable to testify at trial?* If the answer is negative, then the statement may not be used, because live testimony is possible and preferred. *See Barber*; *Roberts*, 448

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(rejecting claim that defendant forfeited double jeopardy right against retrial on acquitted offense by successfully asserting statutory right to appeal conviction on lesser offense).

[16] If the trial court determines as a threshold matter that the reason the victim cannot testify at trial is that the accused murdered her, then the accused should be deemed to have forfeited the confrontation right, even though the act with which the accused is charged is the same as the one by which he allegedly rendered the witness unavailable. Just as in *Bourjaily*, bootstrapping does not pose a genuine problem. *See* Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISRAEL L. REV. 506 (1997).

Note that if one took the rationale of the dying declaration exception seriously, it would justify admitting any statement made on the verge of death. The facts that the exception is limited to statements concerning the cause of the apparently impending death, and that within the criminal context it is limited to homicide cases, suggest that the motivating concern is that the victim cannot testify against the assailant at trial because the assailant killed her.

Children who might otherwise testify at trial are particularly susceptible to intimidation by criminal defendants, in which case forfeiture might apply. *See generally* Friedman, *Conundrum*, *supra*, 65 LAW & CONTEMP. PROBS. (Winter 2002) at 252-55.



U.S. at 63 ("the Confrontation Clause reflects a preference for face-to-face confrontation at trial"). If the answer is affirmative, however, the Confrontation Clause poses no obstacle to admissibility of the statement, unless the prosecution's wrongdoing caused the unavailability. *See Mattox*; *Mancusi*; *Roberts*. Taking the testimony at trial would be ideal, but the ideal is not possible; an opportunity for confrontation is what is essential, and the accused has had it.

We do not contend that resolution of all Confrontation Clause cases becomes easy under the testimonial approach. We do contend that this approach makes easy analysis of cases that, like *Pointer*, *Douglas*, *Lee*, *Lilly*, and this case, pose the core concerns underlying the Confrontation Clause. *See Lilly*, 527 U.S. at 143 (Scalia, J.) (describing the case as involving "a paradigmatic Confrontation Clause violation"). Some cases are close to the borderline, but that is as it should be. We also contend that this approach poses the questions that trial courts should be asking in addressing cases under the Clause, questions that will lead to appropriate results. Indeed, as the citations have suggested, we believe that this approach is consistent with the results of all the Court's Confrontation Clause precedents.

That the Court has reached sensible results under the *Roberts* framework does not suggest that the framework is accomplishing its purpose. On the contrary, the Court has reached sensible results only by manipulating the framework. The framework itself has not led to the results, but has only obscured the unarticulated principle that supports them.

For example, the Court has held that conspirator statements fall within a "firmly rooted" hearsay exception and thus satisfy the *Roberts* reliability requirement. *Bourjaily*, 483 U.S. at 182-84. But the Court did not even suggest that conspirator declarations are a particularly reliable set of statements. Quite the reverse is true. *See id.* at 201 (Blackmun, J., dissenting) ("this exemption has never been justified primarily upon

reliability or trustworthiness grounds and its reliability safeguards are not extensive"); *Inadi*, 475 U.S. at 405 ("It is no victory for common sense to make a belief that criminals are notorious for their veracity the basis of law." (quoting Joseph H. Levie, *Hearsay and Conspiracy*, 52 MICH. L. REV.1159, 1166 (1954))). It would be much better to recognize that conspirator statements are simply not testimonial and so do not fall within the scope of the Confrontation Clause at all.

On the other side, consider *Lee*. At issue was a confession by an accomplice who, while inculpating the accused, also accepted responsibility for a central role in a cold-blooded and brutal murder. Justice Blackmun argued powerfully that the confession was "thoroughly and unambiguously adverse to his penal interest," and that because the portion inculpating the accused was inseverable from the portion inculpating the declarant the statement could not be dismissed as merely an attempt to shift blame to the accused. 476 U.S. at 551-53. Nevertheless, a bare majority refused to treat the statement as a declaration against interest, saying in a footnote, "That concept defines too large a class for meaningful Confrontation Clause analysis." 476 U.S. at 544 n.5. This is an ironic response, given that the *Roberts* framework aims to simplify analysis by exempting from the Confrontation Clause categories of statements that fall within "firmly rooted" hearsay exceptions and so are deemed "without more" to be reliable. The majority then reached the highly contestable conclusion that the statement was not reliable, and so held that admission of the statement violated Lee's confrontation right. This awkward holding would have been unnecessary had the Court simply recognized that the accomplice's statement to the police was clearly testimonial; accordingly, it could not be introduced against Lee unless she had an opportunity to confront the accomplice.

Finally, consider the Court's treatment of unavailability. In *Roberts*, the Court appeared to state a broad rule that hearsay



would not be admissible unless the declarant was shown to be unavailable to be a witness. But in *Inadi* and again in *White* the Court restricted this principle, declining to apply it to the statements involved there and implying that it applied only to former testimony.[17] That the Court "effectively abandoned" the unavailability requirement except for former testimony, Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. Rev. 557, 561 (1988), was perplexing to knowledgeable observers. Calling this "an ironic result," for example, one leading textbook says:

> The major deficiency of hearsay is thought to be the absence of cross-examination, and one of the central concerns of the Confrontation Clause is to ensure that the cross-examination of testifying witnesses is not unduly hampered. Now it appears that the one traditional hearsay exception that turns on the opportunity for cross-examination may face a hurdle under the Confrontation Clause that no other hearsay exception need jump.

RICHARD O. LEMPERT, SAMUEL R. GROSS & JAMES S. LIEBMAN, A MODERN APPROACH TO EVIDENCE 756-57 (3d ed. 2000). *See also, e.g.*, Swift, *supra*, 22 CAP. U. L. REV. at 146-47 (criticizing *White*'s "blanket rejection of an unavailability requirement in most cases" and summarizing negative academic response).

The testimonial approach explains the conundrum. Former testimony should not be used in lieu of trial testimony if it is reasonably possible to cause the witness to testify at trial. But if the testimony of the witness cannot be secured at trial, then the former testimony is a satisfactory substitute, assuming the

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[17] In other settings, the Court has avoided the issue of unavailability. *Lilly*, 527 U.S. at 124 n.1 (plurality opinion); *Wright*, 497 U.S. at 816; *Lee*, 476 U.S. at 539.

accused had an adequate opportunity at an earlier time to confront the witness. If the accused did not have such an opportunity – as in this case, in *Lee*, and in *Lilly* – then the prior testimonial statement may not be used in place of trial testimony, whether the witness is available or not, so long as the accused did not waive or forfeit the confrontation right. If, on the other hand, the statement is not testimonial in nature, then the Confrontation Clause poses no obstacle to its admissibility (though local evidentiary rules might), whether the declarant is available or not. To a considerable extent, the hearsay exceptions other than the one for former testimony define, or can be manipulated to define, categories of evidence that are not testimonial. Statements falling within such categories should present no confrontation issue, irrespective of unavailability.

In short, the Court's results have been better than its reasons. It is therefore not surprising that lower courts have found the doctrine enunciated by the Court difficult to follow and have often reached unacceptable results, sometimes tolerating what clearly amounted to station-house testimony. For example, even though every member of the Court in *Lilly* agreed that the admission of a non-testifying accomplice's police confession against the defendant violated the Confrontation Clause notwithstanding the State's claim that the confession fell within the statement against penal interest hearsay exception, many lower courts since *Lilly* have admitted police confessions from non-testifying accomplices under that very same exception, often finding such statements to be exceptionally "trustworthy." *See* Roger W. Kirst, *Appellate Court Answers to the Confrontation Question in* Lilly v. Virginia, 53 SYR. L. REV. 87 (2003) (reviewing post-*Lilly* cases). Only if the Court articulates the underlying principle that has guided its decisions will the lower courts be able to follow its lead consistently.

The Court should resist the temptation to put off until



another day the restructuring that it needs to do. There will never be a case in which achieving a sensible result will *require* the Court to reject the current framework. But, as we have shown, that fact does not suggest that the framework is succeeding. On the contrary, it means that the framework is so malleable as to have no guiding force. A court can reach any result it sees fit under the current framework. If it is inclined to hold that the Confrontation Clause does not preclude admissibility of a given statement, it can find adequate case-specific "indicia of trustworthiness" to cite. If it is inclined to hold that the Clause does preclude admissibility, it can cite reasons why the particular statement is not in fact sufficiently trustworthy, and as in *Lilly* it can hold that the "firmly rooted" prong does not apply because the hearsay exception in issue is not "firmly rooted" to the extent the exception is deemed to cover statements of a given description. Alternatively, except when a federal court reviews a state conviction, the court can issue a restrictive ruling on hearsay law, and thus exclude the evidence without reaching the confrontation issue, though doing so has collateral consequences in making hearsay law unduly rigid in contexts where the confrontation right is not at stake.[18]

If the Court continues to use the present framework, it can continue to reach sensible results, but the lower courts will also continue to manipulate the doctrine to reach unpredictable and indefensible results. The Court should not forsake the opportunity to articulate and protect a noble principle of long standing, one that will provide clear guidance to the lower courts.

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[18] Thus, for example, *Williamson v. United States*, 512 U.S. 594 (1994), construed the exception for declarations against interest far more restrictively than most prior authorities suggested, *see* 2 MCCORMICK ON EVIDENCE 344-45 (John William Strong, gen. ed. 4th ed. 1992). The *Williamson* rule has limited applicability of the exception in civil as well as criminal cases. *See Silverstein v. Chase*, 260 F.3d 142 (2d Cir. 2001).

## CONCLUSION

Current doctrine relies on hearsay law to do the work that should be performed by the Confrontation Clause, and this has been detrimental to both. It has made hearsay law overly rigid, and it has obscured the meaning of the Clause. Once it is recognized that the scope of the Clause is narrower than that of hearsay law, that it applies only to those statements that are testimonial in nature, the essence of that right becomes apparent: It protects one of the central procedural aspects of our system of criminal justice, the presentation of testimony in the presence of the accused and subject to cross-examination. That right may be waived or forfeited, but it is not subject to exceptions nor can it be trumped by a judicial determination that the particular statement at issue is reliable.

Respectfully submitted,

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No. 02-9410

IN THE

# Supreme Court of the United States

MICHAEL D. CRAWFORD,

*Petitioner,*

v.

WASHINGTON,

*Respondent.*

**On Writ of Certiorari to the Supreme Court of Washington**

## MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF WASHINGTON IN SUPPORT OF PETITIONER

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## MOTION OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF WASHINGTON FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

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*Amici curiae* the National Association of Criminal Defense Lawyers ("NACDL"), the American Civil Liberties Union and the ACLU of Washington ("ACLU") respectfully request leave of this Court to file the following Brief in the above captioned matter. In support of their motion, NACDL and the ACLU state as follows:

1. NACDL and the ACLU requested the consent of both petitioner and respondent to file their *amici curiae* brief in this case. The petitioner granted his consent in writing. Petitioner's written consent has been filed with the Court. Respondent refused its consent.

2. NACDL is a non-profit corporation with a membership of more than 10,000 attorneys and 28,000 affiliate members in 50 states, including private criminal defense lawyers, public defenders and law professors. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that criminal proceedings are handled in a proper and fair manner. NACDL's objectives include the promotion of the proper administration of justice. To promote these goals, NACDL has frequently appeared before this Court as *amicus curiae*.

3. NACDL believes that its familiarity with the courtroom level application of this Court's Confrontation Clause rulings will aid this Court's understanding of the issues presented in this case. This brief focuses on the practical consequences of this Court's decisions for criminal defendants and defense attorneys.

4. The ACLU is a nationwide, nonprofit, nonpartisan organization with nearly 400,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Washington is its statewide affiliate. In support of those principles, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*.

5. The ACLU recognizes that this case raises the important question of how the vital protections of the Confrontation Clause should be implemented. The ACLU believes this brief, which focuses on how consistent application of the right to confront one's accusers aids the accuracy and fairness of the criminal process, will aid in this Court's consideration of this case.

Respectfully submitted,


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## QUESTIONS PRESENTED

I. Whether the Confrontation Clause of the Sixth Amendment permits the admission against a criminal defendant of a custodial statement by a potential accomplice on the ground that parts of the statement "interlock" with the defendant's custodial statement.

II. Whether this Court should reevaluate the Confrontation Clause framework established in *Ohio* v. *Roberts*, 448 U.S. 56 (1980), and hold that the Clause unequivocally prohibits the admission of out-of-court statements insofar as they are contained in "testimonial" materials, such as tape-recorded custodial statements.

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## INTEREST OF *AMICI CURIAE*[1]

The interest of *amici* is set forth in the accompanying motion for leave to file this brief.

## SUMMARY OF ARGUMENT

In this case, the State of Washington secured the conviction of Petitioner by using a statement of his wife and accomplice, Sylvia Crawford, given in response to police questioning while in police custody. Sylvia did not appear at trial and was never subject to cross-examination, was never observed by the jury, and was never required to offer her statement inculpating Petitioner while in his presence. The substance of her statement helped the State defeat Petitioner's self-defense theory. See *State* v. *Crawford*, 54 P.3d 656, 663 (Wash. 2002) (reproducing Sylvia's testimony discussing whether the victim had reached for a knife before or after Petitioner stabbed him). While Sylvia inculpated herself in the crime, her statement also shifted blame from herself to her husband by clearly identifying him as the assailant, not her.

Admission of statements like Sylvia's strikes at the core of the Confrontation Clause. As this Court has repeatedly recognized, the right of confrontation was designed to prevent trial and conviction by witness affidavit obtained by investigators without affording the accused the opportunity to confront the witness. *Lilly* v. *Virginia*, 527 U.S. 116, 124 (1999) (plurality opinion); *White* v. *Illinois*, 502 U.S. 346, 362 (1992) (Thomas, J., concurring); *Dutton* v. *Evans*, 400 U.S. 74, 94 (1970) (Harlan, J., concurring); *Mattox* v. *United States*, 156 U.S. 237, 242 (1895). Sylvia's statement closely

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[1] Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation of this brief.

resembles that old and rejected model. That is why this Court has repeatedly held that a witness statement, made to the police investigating a crime, and inculpating the defendant must be excluded. *Lilly*, *supra*; *Idaho* v. *Wright*, 497 U.S. 805 (1990); *Cruz* v. *New York*, 481 U.S. 186 (1987); *Lee* v. *Illinois*, 476 U.S. 530 (1986); *Douglas* v. *Alabama*, 380 U.S. 415 (1965); *Bruton* v. *United States*, 391 U.S. 123, 133-34 (1968).

Nonetheless, the Washington Supreme Court, applying the Confrontation Clause framework established by this Court in *Ohio* v. *Roberts*, 448 U.S. 56 (1980), allowed Sylvia's statement to be admitted against Petitioner at trial. The *Roberts* framework permits a judge to admit an unavailable witness's out-of-court statement if the statement contains "particularized guarantees of trustworthiness." *Id.* at 66. According to the Washington Supreme Court, Sylvia's statement could go to the jury without the rigors of adversarial testing, and without Sylvia appearing in the courtroom and standing before Petitioner and the jury when offering her statement, because the court itself had deemed the statement sufficiently trustworthy. The Washington Supreme Court based its reliability finding on its view that "Sylvia's and [Petitioner's] statements [to the police] are virtually identical," and hence the statements "interlock[]." *Crawford*, 54 P.3d at 664; see also *id.* at 663 (whenever an accomplice's statement to the police interlocks with the defendant's statement to the police, it is sufficiently reliable to be admitted even when the accomplice is unavailable to appear at trial) (citing *State* v. *Rice*, 844 P.2d 416, 427 (Wash. 1993)).

The Washington Supreme Court's decision is but one example of the inconsistency and indeterminacy that plagues the *Roberts* framework. Lower courts have proven unable to serve the values of the Confrontation Clause within the *Roberts* framework. That framework is too vague, allowing too much judicial subjectivity to determine the scope of this



fundamental constitutional right in particular cases. This case presents a particularly powerful example of the problem. For this Court's caselaw attempting to refine and apply the *Roberts* framework leaves no room for doubt: an unavailable accomplice's custodial statement to the police investigating the crime may not be admitted against a defendant merely because that statement "interlocks" with the defendant's own custodial statement to the police. And "interlocking" statements are hardly the only cases that have produced inconsistent results under the *Roberts* framework. It is thus time for this Court to abandon *Roberts*.

In place of *Roberts* this Court should adopt what has been called the "testimonial" approach. The testimonial approach would prohibit the admission of out-of-court statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial (unless the defendant has the opportunity to confront the witness). The testimonial approach grows out of the Confrontation Clause's central purpose of preventing trial by affidavit. In addition, the Confrontation Clause's language more naturally supports the testimonial view than the current reliability-based approach of *Roberts*. Of particular importance to *amici*, the testimonial approach would not require the trial court to make the inherently subjective finding that a statement is or is not trustworthy, a task practically guaranteed to produce inconsistency even in what should be simple cases. Instead, by focusing on the purpose for which the statement was made and recorded, the most common cases become simple, and even the hard cases would be more consistently resolved.

## ARGUMENT

### THE CONFRONTATION CLAUSE PROHIBITS THE ADMISSION OF TESTIMONIAL OUT-OF-COURT STATEMENTS AGAINST A DEFENDANT UNLESS THE DEFENDANT HAS BEEN PROVIDED AN OPPORTUNITY TO CONFRONT THE WITNESS.

The Confrontation Clause of the Sixth Amendment, applicable to the States through the Fourteenth Amendment, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const., amend. VI; *Pointer* v. *Texas*, 380 U.S. 400 (1965). The Confrontation Clause's mission is to "advance the accuracy of the truth determining process in criminal trials." *Tennessee* v. *Street*, 471 U.S. 409, 415 (1985) (citing *Dutton* v. *Evans*, 400 U.S. 74, 89 (1970)). The "confrontation" between the witness and the accused at trial is not only a deeply felt requirement for a just criminal process, *Coy* v. *Iowa*, 487 U.S. 1012, 1017 (1988), but provides concrete and practical aids for determining the truth. *Kentucky* v. *Stincer*, 482 U.S. 730, 739 (1987) (referring to the Confrontation Clause as a "functional" aid in the search for truth); *Maryland* v. *Craig*, 497 U.S. 836, 862 (1990) (Scalia, J., dissenting) (stating the Confrontation Clause "guarantees specific trial procedures that were thought to *assure* reliable evidence" would support criminal convictions). As a review of recent lower court caselaw, including this case, indicates, the *Roberts* framework too often fails to ensure juries can evaluate the truthfulness of witness testimony with the aids the Confrontation Clause was intended to provide. By contrast, the testimonial approach well arms the jury for its critical truth-finding task.



### A. Confrontation As A Procedural Mechanism For Discovering Truth.

A witness who provides testimony in court, standing before the jury and in front of the accused cannot help but be impressed with the potentially serious consequences of his or her words. Requiring the witness to take an oath before testifying is but one way the trial process impresses upon the witness the importance of speaking truthfully. *Craig*, 497 U.S. at 845-46 (quoting *California* v. *Green*, 399 U.S. 149, 158 (1970)). By requiring the witness to stand before the defendant, the confrontation right taps into "something deep in human nature" that makes lying about the deeds of another more difficult "to his face than behind his back." *Coy*, 487 U.S. at 1017-20. And the jury, in whose presence all of this takes place, has a full opportunity to observe the demeanor of the witness as he or she delivers a claim in the defendant's presence that the defendant's conduct warrants the censure of the community and a loss of liberty. *Green*, 399 U.S. at 158.

Most prominently in the Anglo-American tradition, the confrontation between witness and accused enables counsel for the accused to cross-examine the witness, "the greatest legal engine ever invented for the discovery of truth." *Id.* at 158. Cross-examination enables the defendant to explore inconsistencies between a witness' testimony and other evidence, probe any biases that may have led the witness to distort the truth, and open lines of inquiry that the State, for whatever reason, may have neglected. *Taylor* v. *Illinois*, 484 U.S. 400, 411-12 (1988) (stating "cross-examination[] minimizes the risk that a judgment will be predicated on incomplete, misleading, or even deliberately fabricated testimony"). The highest court in South Carolina summed up the practical effect of the right of confrontation nearly 160 years ago, and the words remain as true today as they were then: The right of confrontation "expresses well the searching process and practical test furnished and intended by this rule of law; in order to correct any misconception of facts, to elicit

truth, and justify the severe retribution awarded in cases of clear guilt." *State* v. *Campbell*, 30 S.C.L. (1 Rich.) 124 (1844), *available at* 1844 WL 2558, at *1.

The "rigorous testing" the Confrontation demands of witness testimony against the accused, *Craig*, 497 U.S. at 845, stands in sharp contrast to the "paradigmatic evil the Confrontation Clause was aimed at," *Dutton*, 400 U.S. at 94 (Harlan, J., concurring), government presentation of witness testimony against the accused by affidavit. "[T]he particular vice that gave impetus to the confrontation clause was the practice of trying defendants on 'evidence' which consisted solely of *ex parte* affidavits or depositions secured by the examining [English] magistrates, thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact." *Green*, 399 U.S. at 156; *Lilly*, 527 U.S. at 124 (plurality opinion) (referring to the "particular abuse [of] ... prosecuting a defendant through the presentation of *ex parte* affidavits"); *White*, 502 U.S. at 362 (Thomas, J., concurring) (stating "the primary purpose of the [Confrontation] Clause was to prevent the abuses that had occurred in England"); *Mattox*, 156 U.S. at 242 (1895) ("The primary object of the [Confrontation Clause] was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness...."). When the government offers witness testimony through affidavit, it avoids all the practical devices for evaluating witness credibility the Confrontation Clause intends the jury to have at its disposal.

When viewed from this combination of practical and historical perspectives, the Confrontation Clause serves a value beyond the important and much-recognized purpose of enhancing the reliability of witness testimony and enabling the jury to evaluate truthfulness. The Confrontation Clause, like other provisions of the Bill of Rights, limits the power of the State. The Confrontation Clause prevents the government



from presenting witness testimony against the accused in a form other than in open court, where the accused may "confront" the witness. This limits the power of the government to shape witness testimony, intentionally or otherwise, by exploring only certain lines of inquiry. 3 William Blackstone, *Commentaries on the Laws of England* *373 (1768) (referring to the "artful or careless scribe" who "may make a witness speak what he never meant"). This limits the power of the government to influence the witness through secret deals. And this limits the power of the government to punish the defendant on the basis of an accusation lodged by a witness unwilling to condemn the defendant to his face. *Id.* at *373 (noting that a witness "may frequently depose in private, which he will be ashamed to testify in a public and solemn trial"). The lessons drawn from the rejected *ex parte* affidavit procedure, lessons constitutionalized in the Confrontation Clause, include the recognition that untested witness testimony can mislead the jury, undermining the search for truth even more than no testimony at all.

The Confrontation Clause thus imposes a procedural limitation on the State: a defendant's liberty may not be restrained on the basis of witness testimony unless the defendant has had the opportunity to confront the witness. *Craig*, 497 U.S. at 845 ("Confrontation Clause ... ensure[s] the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact."). And this rule applies even when the "truth" may well be better served by ignoring the procedural burden the Confrontation Clause imposes. *Bruton*, 391 U.S. at 133-34 (rejecting right of prosecution to use codefendant's confession implicating defendant at joint trial even when jury finds codefendant guilty thus demonstrating jury's view that confession was reliable).

Petitioner's case represents the closest our adversarial system of justice can come to reproducing the trial by

affidavit process. *Lilly*, 527 U.S. at 137 (plurality opinion) (describing accomplice custodial confession as "implicat[ing] the core concerns of the old *ex parte* affidavit practice"); *Id.* at 143 (Scalia, J., concurring). Petitioner is a criminal defendant who was convicted on the basis of a statement given out of his presence to the police investigating the case. This statement was read to the jury despite the fact that the accused never had the opportunity to confront the witness. Any approach to the Confrontation Clause that permits such evidence to be admitted against the accused fails on every level. It fails at the historical level, by permitting the very evil the Confrontation Clause was designed to prevent. It fails at the political level, by restoring to the State the power to obtain convictions based on untested witness testimony. And it fails on the practical level, by permitting the jury to hear testimonial evidence without providing it with the tools it needs to determine the truth. Cases involving witness statements to law enforcement investigating the crime are thus the easy cases; cases involving these statements should yield maximum consistency and protection if the Confrontation Clause is operating properly.

### B. The *Roberts* Framework Fails To Protect The Values Of The Confrontation Clause Because Its Inherent Subjectivity Produces Inconsistent Results.

The Confrontation Clause, under this Court's highly subjective framework set forth in *Ohio* v. *Roberts*, *supra*, is not functioning properly. To be sure, the outcome of this Court's caselaw has been consistent. This Court has uniformly refused to allow witness statements inculpating the defendant to be admitted against the accused at trial unless the defendant has had the opportunity to "confront" the witness. But even as this Court has been consistent in applying *Roberts* to these paradigm statements requiring confrontation, it has done so without stating a clear rule. Instead, it has remained within the reliability-based framework of *Roberts*.



As a result, even this Court's consistently correct results have sometimes turned on a single vote. *Lee* v. *Illinois*, 476 U.S. 530 (1986) (five-to-four decision excluding codefendant confession); *Idaho* v. *Wright*, 497 U.S. 805 (1990) (five-to-four decision finding child statements to pediatrician lacked sufficient indicia of reliability to be admissible). Thus this Court's own decisions reflect how the subjective reliability inquiry will lead reasonable judicial minds to reach different conclusions.

And lower courts applying *Roberts* are, in fact, reaching widely divergent and irreconcilable conclusions. Lower courts often admit into evidence witness statements to the police inculpating the defendant, the very statements that strike at the core of the Confrontation Clause and that this Court has consistently recognized requires confrontation. The failure of *Roberts*, and this Court's caselaw applying it, to guide the lower courts to the historically correct results, or even to a consistent method of analysis, counsels in favor of its replacement. Three Justices of this Court have suggested that *Roberts* provides a misguided approach. *Lilly*, 527 U.S. at 140-43 (Breyer, J., concurring); *White*, 502 U.S. at 362 (Thomas, J., concurring). This Court now squarely has the question of *Roberts*' continued utility and consistency with the Sixth Amendment's text, history and purposes before it. This Court should abandon the *Roberts* framework as a failure on its own terms.

*1. This Court's Decisions Uniformly Reject The Admission Of Statements Functionally Equivalent To The* Ex Parte *Affidavit.* In *Douglas*, an accomplice of the defendant refused to testify when called to the stand. With the accomplice still on the stand, and in the presence of the jury, the prosecutor then read a confession that had allegedly been signed by the accomplice and that inculpated the defendant in the crime. 380 U.S. at 416-17. This Court, without qualification held that "petitioner's inability to cross-examine [the witness] as to the alleged confession plainly denied him the right of cross-

examination secured by the Confrontation Clause." *Id.* at 419. In so stating, this Court remained consistent with the absolute position it took with respect to the Phillipine Bill of Rights (which contains a provision that is "substantially ... the 6th Amendment"): the right of confrontation "intends to secure the accused ... the right to be tried, so far as facts provable by witnesses are concerned, by *only* such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an opportunity of cross-examination." *Dowdell* v. *United States*, 221 U.S. 325, 329-30 (1911) (emphasis added). And *Dowdell* had remained true to this Court's statement in *Motes* v. *United States*, 178 U.S. 458, 473-74 (1900), which referred to the "absolute" rule that the accused enjoy the right to "examine[] and cross-examine[] before the jury" witnesses against him.

This Court's firm approach in favor of the confrontation procedure reflected its understanding of the importance of the confrontation right to the accused. As this Court well understands, the kind of secret, untestable testimony of a witness that the Confrontation Clause was designed to prevent can, if admitted, be "devastating" to a defense. *Bruton*, 391 U.S. 136. Indeed, such statements are so devastating that this Court in *Bruton* prohibited their admission in a joint trial even when the jury was pointedly instructed to disregard the accomplice's confession when considering the defendant's guilt.

*Roberts* marked a shift away from the strict approach the Court had followed with respect to out-of-court witness statements, at least in word if not deed. In *Roberts*, this Court permitted the prosecution to present at trial the statements of a witness against the accused made at the accused's preliminary hearing, where the accused had, in effect, cross-examined the witness. In the process, this Court established a general framework for analyzing when the Confrontation Clause permits the admission of an out-of-court statement of a witness against a criminal defendant. Under the *Roberts*



formula, the out-of-court statement is admissible if it bears adequate "indicia of reliability." *Roberts*, 448 U.S. at 66.

> Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

*Id.*

This new framework imposed two subtle, but significant, shifts in emphasis for Confrontation Clause analysis. First, *Roberts* characterized "face-to-face confrontation at trial" as a "preference," not a constitutional command. *Id.* at 63. *Craig*, 497 U.S. at 849. Second, the *Roberts* framework placed "reliability" alone at the center of the analysis. See also, *Craig*, 497 U.S. at 845 (characterizing reliability as the "central concern of the Confrontation Clause"). This Court imposed this new framework to "respond[] to the need for certainty in the workaday world of conducting criminal trials." *Roberts*, 448 U.S. at 66.

Despite *Roberts*' promise of "certainty" in the application of the Confrontation Clause, this Court has, since *Roberts*, on four occasions been forced to consider how to apply the *Roberts* framework to the most straightforward cases: those involving a witness statement that functionally resembles the *ex parte* affidavit. In each case, this Court has properly rejected the admission of the statement. And the Court in its most recent case most forcefully indicated that the Confrontation Clause does not permit the admission of such a statement. But in each case, this Court has done so while remaining within the *Roberts* framework, and thus on each occasion this Court has allowed the possibility that the Clause might, in the proper case, permit the admission of what is effectively an *ex parte* affidavit.

*Lee*, the case most similar to Petitioner's, involved the admission of a codefendant's confession to a double murder

because the confession was said, by the lower court, to "interlock" with that of the defendant. *Lee*, 476 U.S. at 538-39. This Court reversed, concluding that the "discrepancies between the [confessions were] not insignificant." *Id.* at 545. Despite repeatedly emphasizing the "presumptive unreliability" of codefendant confessions implicating the accused, *id.* at 541-43, 545, the Court specifically stated that that "presumption may be rebutted." *Id.* at 543. The Court did not, however, specify exactly what could overcome the presumption. Rather, it merely noted that "when codefendants' confessions are identical in all material respects, the likelihood that they are accurate is significantly increased." *Id.* at 545.

In *Cruz*, this Court held fast to the rule of *Bruton* and refused to allow a codefendant's confession implicating the defendant to be admitted in a joint trial, even when the jury was properly instructed not to consider the codefendant's confession as evidence against the defendant, and even when the defendant had also confessed and the two confessions "interlocked." Yet, once again, the Court suggested that the statement it excluded might conceivably be admitted consistent with the Confrontation Clause. After explaining why the fact that the confessions "interlocked" did not alter the rule of *Bruton*, this Court said "the defendant's confession may be considered at trial in assessing whether his codefendant's statements are supported by sufficient 'indicia of reliability' to be directly admissible against him...." *Cruz*, 481 U.S. at 193-94.

*Wright* involved the admission of statements of the defendant's youngest daughter and alleged victim of abuse to a pediatrician made while the daughter was in the police's protective custody. *Wright*, 497 U.S. at 809-10. This Court held that the witness's untested statement was not sufficiently reliable to be admitted. *Id.* at 826-27. But the Court reached this conclusion not as a categorical matter, but quite the opposite. The Court emphasized that the reliability of a



witness's out-of-court statement should be evaluated in light of "the totality of the circumstances," *id.* at 826, thus making clear that a case-by-case approach was commanded. This Court did focus that inquiry somewhat, however, making clear that the only circumstances relevant to the statement's reliability are those surrounding the making of the statement itself; corroborating evidence cannot be used to support the reliability of an out-of-court witness statement. *Id.* at 822-24.

Finally, this Court most recently decided in *Lilly* that a codefendant's confession to the police implicating himself and the defendant in a crime could not be admitted against the defendant. This Court went further toward a categorical rule than it had since instituting the *Roberts* framework, stating that:

> It is highly unlikely that the presumptive unreliability that attaches to accomplices' confessions that shift or spread blame can be effectively rebutted when the statements are given under conditions that implicate the core concerns of the old *ex parte* affidavit practice—that is, when the government is involved in the statements' production, and when the statements describe past events and have not been subjected to adversarial testing.

*Lilly*, 527 U.S. at 137 (plurality opinion). That is, when it comes to statements that function like *ex parte* affidavits (most commonly, the custodial confession of a codefendant), this Court has adopted something just short of a categorical rule against their admission. According to *Lilly*, such statements, even though against penal interest under recognized hearsay law, are not a "firmly rooted" hearsay exception that might be admitted on that ground under *Roberts*. *Lilly*, 527 U.S. at 134 (plurality opinion). Instead, if they are to come into evidence at all, it would have to be under the second prong, the amorphous residual trustworthiness prong. And with respect to general reliability,

this Court has indicated that such statements are "highly unlikely" to be permissible. *Id.* at 137 (plurality opinion).

Indeed, after *Lilly*, it is difficult to imagine what "highly unlikely" circumstances would render statements similar to *ex parte* affidavits sufficiently reliable to warrant their admission. For *Lilly* rejected the suggestion in *Lee* and *Cruz* that a codefendant's confession might draw sufficient reliability from its overlap with the defendant's own admissible confession to be admissible under the *Roberts* framework. Relying on its previous decision in *Idaho* v. *Wright*, this Court flatly stated that it had "squarely rejected the notion that 'evidence corroborating the truth of a hearsay statement may properly support a finding that the statement bears particularized guarantees of trustworthiness.'" *Lilly*, 527 U.S. 137-38 (plurality opinion) (quoting *Wright*, 497 U.S. at 822). Since a defendant's confession that "interlocks" with a codefendant's confession is nothing but a particular item of "evidence corroborating the truth of [the] hearsay statement" (namely, the codefendant's confession), under *Lilly* and *Wright* courts must disregard the defendant's own confession when determining whether the codefendant's statement is sufficiently reliable to be admitted. No matter how much the confessions "interlock" and no matter how much other evidence corroborates the *ex parte* affidavit-like statement, all of that is "irrelevant" to admissibility. *Lilly*, 527 U.S. at 137 (plurality opinion).

Despite all of this, the plurality opinion in *Lilly* nowhere states that custodial confessions of an accomplice are always inadmissible unless the accomplice testifies at trial. To the contrary, by once again reaffirming the *Roberts* framework, and by emphasizing that "hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness," *Lilly*, 527 U.S. at 138 (plurality opinion), this Court once again left open the possibility that



even an accomplice's custodial confession might, in the appropriate circumstances, pass the test.[2]

*2. This Court's Adherence To The* Roberts *Framework Causes Confusion In The Lower Courts.* Despite the fact that this Court has not indicated what facts will render an absent codefendant's statement to investigators admissible consistent with the Confrontation Clause, the lower courts, relying on the *Roberts* framework, all too frequently allow such statements to be admitted against the accused. What should be a straightforward application of the Confrontation Clause has been, in the lower courts, anything but. Lower courts, engaging in the inherently subjective inquiry into the "reliability" of statements that resemble the *ex parte* affidavit have produced results that are inconsistent, and at odds with the core values and purpose of the Confrontation Clause.

This very case presents a prime example. Sylvia Crawford's statement was produced under circumstances closely resembling the *ex parte* affidavit procedure. Yet the Washington Supreme Court, speeding past the fact that her statement was "presumed unreliable," focused its inquiry on the search for "indicia of reliability" that would permit the statement to be introduced. *State* v. *Crawford*, 54 P.3d 656, 663 (Wash. 2002). That is, despite this Court's repeated emphasis on the evil of the *ex parte* affidavit procedure, the Washington Supreme Court remained focused on the *Roberts*-mandated quest for "indicia of reliability." And all the Washington Supreme Court needed to satisfy itself that the statement was sufficiently "reliable" was the overlap between Sylvia's statement and Petitioner's confession. It is hard to imagine a more clear indication of how malleable the *Roberts*

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[2] Justice Scalia's concurring opinion rejects the *Roberts* approach and accepts that custodial accomplice confessions are automatically barred under the Confrontation Clause. *Lilly*, 527 U.S. at 143 (Scalia, J., concurring).

"reliability" inquiry is, and how poorly it serves the values of the Confrontation Clause.

Numerous other cases have followed a similar pattern. Lower courts pay little heed to the historical incongruity of admitting what are the functional equivalents of *ex parte* affidavits, and press ahead with the search for "indicia of reliability." The "presumption" of unreliability has lost any meaningful force after 23 years of subjective inquiry into reliability. It is little more than a requirement that the State characterize the statement as possessing as many factors as possible that courts have in the past identified as supporting a statement's reliability. The result is that absent codefendant statements that even this Court's caselaw clearly indicates should be excluded from evidence, are admitted, with devastating effect. *Calvert* v. *Wilson*, 288 F.3d 823, 831-32 (6th Cir. 2002) (finding state court's admission of codefendant custodial statement, made in response to police officer's leading questions, violates clearly established federal law as determined by this Court).

A review of the cases shows just how malleable the various factors can be. In Michigan, if a codefendant's statement was made "voluntarily" to the police, and if the codefendant was free to leave throughout the interview, then the statement inculpating the defendant and the codefendant is admissible against both. *People* v. *Schutte*, 613 N.W.2d 370, 375-76 (Mich. Ct. App. 2000). Likewise in Illinois. *People* v. *Thomas*, 730 N.E.2d 618, 626 (Ill. App. Ct. 2000). In Oregon, however, it is fine *not* to be free to leave, so long as the court determines that the witness is still speaking "voluntarily" to the investigating officer. *State* v. *Franco*, 950 P.2d 348, 352 (Or. Ct. App. 1997). Wyoming appears in line with Oregon, at least when the statement was initially volunteered, and continued "voluntarily" after *Miranda* warnings were issued. *Brown* v. *State*, 953 P.2d 1170, 1179-80 (Wyo. 1998).



Michigan, Illinois and Oregon all prefer statements emerging from the defendant himself without prodding by questions from the officer, though Oregon thinks it is fine to ask a single "basic, non-leading question." *Franco*, 950 P.2d at 352; *Schutte*, 613 N.W.2d at 376 (emphasizing that codefendant statement was not in response to police questioning); *Thomas*, 730 N.E.2d at 625. The Eighth Circuit thinks that statements made in response to a series of questions are fine, if the questions are not leading and the responses are in the form of a narrative. *United States* v. *Papajohn*, 212 F.3d 1112, 1120 (8th Cir. 2000). The Seventh Circuit will even allow a statement drafted by the government, and adopted by the codefendant, to be admitted against the defendant. *United States* v. *Centracchio*, 265 F.3d 518, 529 (7th Cir. 2001) (approving admission of codefendant's plea allocution despite fact that "prosecutor recited the actual content of the plea agreement and [the witness] just acknowledged with a short reply that he agreed with it").

In Michigan, Oregon, and Wyoming it is helpful if the codefendant was not given any reason to believe his statement to the police would result in lenient treatment. *Franco*, 950 P.2d at 352; *Schutte*, 613 N.W.2d at 376; *Brown*, 953 P.2d at 1179-80. In Illinois, it is helpful also, but perhaps not so harmful if the person offering the statement was "trying to gain favor or leniency." *Thomas*, 730 N.E.2d at 625 (reliability of such a statement is merely "diminished"). In Ohio, too, a statement made to the police after a promise of leniency would be unreliable, but if the police told the witness only that after he confesses the State might "cut him some slack," then the statement can be reliable. *State* v. *Marshall*, 737 N.E.2d 1005, 1009 (Ohio Ct. App. 2000). Such a hint, short of a promise of leniency, weighs heavily against admission in the Tenth Circuit. *United States* v. *Gomez*, 191 F.3d 1214, 1223 (10th Cir. 1999). A suggestion of leniency renders a statement unreliable in the Seventh Circuit, *United*

*States* v. *Castelan*, 219 F.3d 690, 695 (7th Cir. 2000), unless the statement that is made in the hopes of obtaining leniency is a plea allocution, in which case it is admissible, *Centracchio*, 265 F.3d at 529. The Second Circuit, too, routinely approves the admission of a codefendant's plea allocution, even though it is designed in part to generate more lenient treatment from the prosecution. *United States* v. *Dolah*, 245 F.3d 98, 105 (2d Cir. 2001).

The time lag between the witness's statement to authorities and the incident being described has also generated different views. The general view appears to be that the sooner the better, but how soon is soon enough? Michigan seeks the minimum time-lag. *Schutte*, 613 N.W.2d at 376 (expressing a preference for statements to investigating officers made "contemporaneously with the events referenced"). The Tenth Circuit will accept a statement made "soon after" the events being described occurred, *Gomez*, 191 F.3d at 1222-23, as will Colorado, *Stevens* v. *People*, 29 P.3d 305, 315 (Colo. 2001). In Illinois, the same day is good enough. *Thomas*, 730 N.E.2d at 626. The Second Circuit's plea allocution cases seem indifferent to the time lag between incident and statement. *Dolah*, 245 F.3d at 105 (citing cases).

Most courts insist that a statement to an investigating officer must be "genuinely incriminating," by which they appear to mean that it does not minimize the witness's role in the crime or attempt to shift blame to the defendant. *Stevens*, 29 P.3d at 315; *Brooks* v. *State*, 787 So.2d 765, 776-77 (Fla. 2001); *Gabow* v. *Commonwealth*, 34 S.W.3d 63, 78-79 (Ky. 2000); *Barrow* v. *State*, 749 A.2d 1230, 1244 (Del. 2000); *Earnest* v. *Dorsey*, 87 F.3d 1123, 1134 (10th Cir. 1996); *State* v. *Sheets*, 618 N.W. 2d 117, 124-25 (Neb. 2000); *Brown*, 953 P.2d at 1179 (admitting only portion of statement that was "equally incriminating" of defendant and codefendant). But as Petitioner's case rather dramatically illustrates, even this area of agreement is not uniform. For Sylvia Crawford's confession was admitted against the defendant despite the fact



that it unambiguously minimizes her own role in the crime as compared with Petitioner's insofar as it asserted that petitioner, and not Sylvia, stabbed the victim. To Washington, if confessions "interlock" it does not matter that the absent codefendant's confession shifts blame. See also *Wright* v. *State*, 440 S.E.2d 7, 9 (Ga. 1994). Likewise, and perhaps worse, the Wisconsin Court of Appeals has held that a murder suspect's statement to the police inculpating the defendant as the killer, thus shifting blame away from himself, was sufficiently reliable based only on the court's determination (drawn from the police officer's description of the suspect's demeanor when giving the statement) that the suspect was speaking with a truthful state of mind when he inculpated the defendant. *State* v. *Murillo*, 623 N.W.2d 187, 191-93 (Wis. Ct. App. 2000).

A variety of cases have also listed other factors. These factors include the specificity of the statement (the more specific the more reliable), *Stevens*, 29 P.3d at 317; *Gomez*, 191 F.3d at 1222-23; *Brown*, 953 P.2d at 1180, whether the person had a motive to distort the truth, *Crawford*, 54 P.3d at 661 n.3; *Stevens*, 29 P.3d at 317-18; *Gomez*, 191 F.3d at 1222; *Schutte*, 613 N.W.2d at 376, whether an attorney was present when the statement was given (if the attorney is present, more reliable), *People* v. *Campbell*, 721 N.E.2d 1225, 1230 (Ill. Ct. App. 1990), and whether the person was mentally unstable when giving the statement to the police, *Stevens*, 29 P.3d at 318.

The multiplicity of factors relevant to the reliability inquiry serves only to make the inquiry more malleable. The Colorado Supreme Court's decision in *Stevens* illustrates the point dramatically. Though the court said that the closeness in time of a statement to the police and the incident described points toward a statement's reliability, as does the spontaneity of the statement, the court in that case found reliable a statement made in response to leading questions from the police more than two years after the crime took place because

the statement was highly detailed and the court was unable to detect any significant motive for the codefendant to inculpate the defendant. 29 P.3d at 316-18. And comparing the Seventh Circuit's decisions in *Centracchio* and *Castelan* indicate how on one day a factor can be decisive, *Castelan*, 219 F.3d at 695 (suggesting that if statement is made in hopes of obtaining leniency, it is unreliable), but on another day it can be pushed aside, *Centracchio*, 265 F.3d at 529 (acknowledging that codefendant's plea allocution was made in hopes of obtaining leniency, but admitting it against defendant anyway). The shifting use which the courts make of the lengthy list of factors potentially relevant to the reliability inquiry undermines confidence in the ability of *Roberts* actually to ensure the trustworthiness of the statements being admitted against defendants.

The reliability framework *Roberts* imposed on the Confrontation Clause has thus failed in its principal objective: to provide "certainty in the workaday world of conducting criminal trials." *Roberts*, 448 U.S. at 66. With hundreds of trial courts around the nation applying varying vague sets of criteria subjectively to malleable sets of facts, the *Roberts* framework produces the antithesis of certainty. In fact, *Roberts* in practice is less a framework than a hope. Specifically, the *Roberts* framework expresses a hope that trial courts, reviewing the specific facts of the cases before them from their position close to the evidence and the parties, would be able to distinguish between reliable and unreliable evidence, and thus promote accuracy in the trial process. *Wright*, 497 U.S. at 822 (stating "courts have considerable leeway in their consideration of appropriate factors").

The *Roberts* framework assumed that lower courts would settle on criteria that would be readily and consistently applied. But it has not. As described above, trial courts and appellate courts, federal and state courts, are apt to gauge the reliability of the same facts differently. This places an unnecessary strain on the criminal justice process as the



parties and the court spend time and resources trying to decide whether a codefendant's confession was sufficiently reliable to be admitted.

The multi-factored reliability approach *Roberts* imposed turns every effort by the prosecution to admit hearsay testimony under the residual trustworthiness prong of *Roberts* into a time consuming and potentially complicated pre-trial hearing. If an unavailable witness's demeanor, voluntariness, and motive for lying, among other things, are all relevant for determining the admissibility of his out-of-court statement, then the trial court would have to acquaint itself with all the circumstances surrounding the statement before ruling on its admissibility. That task is made especially difficult because the witness himself or herself is, by definition, unavailable. Instead, the trial court must rely upon the individual who heard or recorded the out-of-court statement to recite not only what was said, but detail all the nuances that play a part in evaluating credibility, a process that hardly inspires confidence. See, *e.g.*, *Murillo*, 623 N.W.2d at 191-93. In some cases, this pretrial hearing can balloon into a mini-trial in which the trial judge is forced to determine whether the accusation contained in the out-of-court statement is itself true before deciding whether to permit the jury to hear it. Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 Geo. L.J. 1011, 1027-28 (1998).

The trial process is further burdened by the heightened prospect of error, and consequent appellate reversal, that a subjective rule entails. Without meaningful objective bases for analysis, trial courts are in a weak position to predict how appellate courts will view the reliability of a particular statement in light of all the reliability factors. Appellate reversal will often require retrial, a heavy burden on the judicial system.

The *Roberts* framework imposes these strains on the criminal justice system without producing any increase in the confidence of the truthfinding process. The subjective

evaluation of reliability by a judge is no substitute for the time-honored process of adversarial testing. It is time to abandon *Roberts*.

### C. The Testimonial Approach Provides Greater Certainty And Is More Consistent With The Text And Values Of The Confrontation Clause.

Three members of this Court have already indicated that they are willing to review whether the *Roberts* approach should be abandoned. *Lilly*, 527 U.S. at 142-43 (Breyer, J., concurring); *White*, 502 U.S. at 365-66 (Thomas, J., concurring, joined by Scalia, J.). A variety of legal scholars, too, believe the *Roberts* framework ill serves the purposes of the Confrontation Clause. Penny J. White, *Rescuing the Confrontation Clause*, 54 S.C. L. Rev. 537, 619 (2003); John G. Douglass, *Confronting the Reluctant Accomplice*, 101 Colum. L. Rev. 1797 (2001); Friedman, *supra*; Akhil R. Amar, *The Constitution and Criminal Procedure* 130-31 (1997); Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 Minn. L. Rev. 557 (1992). *Amici* respectfully suggest that this Court take this opportunity to adopt a new framework that makes the common cases easy to resolve and that preserves the values of the Confrontation Clause.

The Confrontation Clause should be read to prohibit the admission of any out-of-court *testimonial* statement unless the defendant has the opportunity to confront the witness. Not every statement uttered, and later used at trial, is *testimonial*. As discussed below, an out-of-court statement is *testimonial* only when the circumstances indicate that a reasonable declarant at the time would understand that the statement would later be available for use at a criminal trial. This understanding of the Clause flows naturally from the paradigm of the *ex parte* affidavit that the Confrontation Clause was designed to prevent. Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. Pa. L. Rev.



1171, 1240-41 (2002). If the most fundamental point of the Confrontation Clause is to prevent the State from securing a conviction on the basis of witness testimony provided to it in private, without providing the defendant the opportunity to confront the witness, then defining the category of excluded statements to encompass that evil serves the purpose of the Clause perfectly.

This approach derives not only from the purposes the Confrontation Clause was meant to serve. It also fits the language of the Confrontation Clause better than the *Roberts* reliability-based approach and finds support in the results of this Court's caselaw, if not its reasoning. This Court's decision in *Roberts* was driven in part by a concern that if the Confrontation Clause's language were "read literally, it would require, on objection, the exclusion of any statement made by a declarant not present at trial." *Roberts*, 448 U.S. at 63; *Craig*, 497 U.S. at 849. This fear is born of a misreading of the term "witness" in the Confrontation Clause. While every person who appears in court is a "witness," not every statement made outside of court is made as a "witness," even if it is later introduced into evidence at a trail.

This Court's caselaw readily provides examples of out-of-court statements by individuals given not as a "witness" to a crime, but rather as a medical patient, *White*, 502 U.S. at 350, or a coconspirator furthering a conspiracy, *Bourjaily* v. *United States*, 483 U.S. 171 (1987); *United States* v. *Inadi*, 475 U.S. 387, 400 (1986); *Wright*, 497 U.S. at 820 (discussing excited utterances). Such statements, at least at the time they are made, are unrelated to any criminal investigation, and hence should not be understood to be statements by a "witness."[3]

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[3] Further, the Confrontation Clause does not absolutely bar the admission of an out-of-court testimonial statement. It only bars such statements when the accused is denied his right to confront the witness. Thus, the testimonial approach does not threaten the long line of cases,

On the other hand, when an individual, especially one suspected of a crime, approaches law enforcement officials, and provides information incriminating another individual (and even perhaps himself or herself), that individual has assumed the role of "witness" within the meaning of the Confrontation Clause. For that person has spoken under circumstances which he or she should reasonably expect will lead the State to punish the accused person. And it is that statement—suggesting that the State should condemn the accused as a criminal and restrain his or her liberty—that the Confrontation Clause insists must run the rigors of adversarial testing in open court. This Court's consistent refusal to permit absent codefendant confessions to be admitted against an accused fits comfortably within the testimonial approach as defined here. *Lilly*, 527 U.S. at 137 (plurality opinion); *Cruz*, 481 U.S. at 193-94; *Lee*, 476 U.S. at 545; *Bruton*, 391 U.S. at 133-34; *Douglas*, 380 U.S. at 419. Likewise, this Court's decision in *Wright*, which involved a victim's statement to a pediatrician who was acting not as a treating physician (as in *White*), but as an investigator fits the testimonial approach as well. Accepting the testimonial view, then, would not require this Court to alter the results of any of its prior cases, just this Court's, and, most critically, the lower courts', reasoning going forward.

Finally, beyond textual and historical coherence, beyond its ability to better serve the values of the Confrontation Clause, the testimonial rule produces more reliable and consistent results. As already noted, the all too typical case involving a codefendant's confession implicating the defendant becomes easy to resolve consistent with the historical exclusion of such statements.

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dating back to *Reynolds* v. *United States*, 98 U.S. 145, 158-61 (1878) and *Mattox*, 156 U.S. at 240-44, involving the admission at trial of prior testimony when the defendant previously confronted the witness.



Further, it becomes much easier to predict the outcomes of cases under this approach based on the knowledge of a very few set of objective facts. By and large, statements made to law enforcement officials about a crime will be testimonial. And by and large, statements made to friends, relatives, accomplices or anyone outside of criminal justice system will not be testimonial.

There will be exceptions to these broad and general rules, of course. A witness to a crime may make a statement to a friend knowing that the friend will subsequently contact police. Such a statement is aimed at law enforcement and would therefore be testimonial. And calls to 911 call for some judgment in the application of the testimonial approach. Friedman & McCormack, *supra* at 1224-25. That is because 911 serves a dual role in our society. It is both a component of our law enforcement system (suggesting that statements to 911 are testimonial) and an emergency response system (suggesting that statements to 911 are not testimonial). Whether a particular statement made to a 911 dispatcher was testimonial would depend on which capacity the caller was using when contacting the system. The important point is that the difficult cases will be the exceptions, whereas under the *Roberts* framework difficult cases are common. Further, under *Roberts*, the resolution of the difficult cases is inherently subjective and turns on how a particular court weighs the relevant mix of facts, which in many cases point in opposite directions. Under the testimonial approach, the difficult cases are resolved by a more focused inquiry, and an objective one as well: what did the speaker reasonably believe would be done with his or her statement.

In the end, *amici* suggests that the practical benefits of abandoning *Roberts* for the testimonial approach counsel strongly in its favor. The kind of evidence that is too often erroneously admitted against criminal defendants can be devastating to a defense. A rule that reliably prevents such evidence from being introduced will enhance both the

administrative efficiency of the criminal justice system, and its fairness. In comparison to the prevailing alternative, it is clearly preferable.

## CONCLUSION

The judgment of the Supreme Court of Washington should be reversed.

Respectfully submitted,

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# In the Supreme Court of the United States

MICHAEL D. CRAWFORD, PETITIONER

*v.*

STATE OF WASHINGTON

*ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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## QUESTION PRESENTED

The United States will address the following question:

Whether the Confrontation Clause imposes a categorical prohibition against the admission of hearsay statements that are testimonial in nature.

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# In the Supreme Court of the United States

No. 02-9410

MICHAEL D. CRAWFORD, PETITIONER

*v.*

STATE OF WASHINGTON

*ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

## INTEREST OF THE UNITED STATES

This case presents the question, *inter alia*, whether the Confrontation Clause imposes a categorical prohibition against the admission of hearsay statements that are testimonial in nature. Because that question has substantial implications for the conduct of federal criminal trials, the United States has a significant interest in the Court's disposition of this case. The United States, in its brief as amicus curiae in *White* v. *Illinois*, 502 U.S. 346 (1992), argued that this Court should adopt an approach that limits application of the Confrontation Clause to out-of-court statements that constitute testimony or its functional equivalent. The United States argues in this case that, as to such testimonial statements, the Confrontation Clause does not impose an absolute rule of inadmissibility.

## CONSTITUTIONAL PROVISION INVOLVED

The Confrontation Clause of the Sixth Amendment of the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him."

## STATEMENT

1. On August 5, 1999, petitioner stabbed Richard Rubin Kenneth Lee at Lee's apartment. Petitioner's wife, Sylvia Crawford, was with him at the time. Later that evening, police arrested petitioner and Sylvia and interrogated them separately. Petitioner and Sylvia each gave a tape-recorded statement describing the circumstances of the stabbing, and then gave a second tape-recorded statement several hours later. J.A. 2-3.

In their initial statements, petitioner and Sylvia both told the officers that Lee had invited them to his apartment earlier in the day, and that, at some point during the evening, petitioner left the apartment to purchase alcohol. Both petitioner and Sylvia said that, upon returning to the apartment, petitioner found Lee making sexual advances toward Sylvia, and petitioner stabbed Lee in an ensuing altercation. J.A. 3, 20-21.

In their second statements, petitioner and Sylvia gave a different account of the events. Both said that Lee had sexually assaulted Sylvia several weeks beforehand rather than on the evening of the stabbing, and that they went to find Lee after petitioner became angry upon the mention of Lee's name. Both also stated that Sylvia directed petitioner to Lee's apartment, and that, after the three spoke for a short time, petitioner stabbed Lee. J.A. 3, 21.

Petitioner, when asked whether he had seen anything in Lee's hands, indicated that he thought Lee had



reached for an object "right before everything happened. He was like reachin', fiddlin' around down here and * * * this is just a possibility, but I think, I think that he pulled somethin' out and I grabbed for it and that's how I got cut." J.A. 18. Sylvia, after being asked whether Lee fought back from the assault, stated that Lee "lifted his hand over his head maybe to strike [petitioner's] hand down or something and then * * * put his right hand in his right pocket . . . took a step back . . . [Petitioner] proceeded to stab him . . . then his hands were like * * * open arms . . . with his hands open and he fell down." J.A. 16. Sylvia said that she did not see anything in Lee's hands when he held them open. J.A. 17. Sylvia also told the officers that petitioner was "infuriated" and "past tipsy" and had said before the incident that Lee "deserve[d] a ass whoopin." J.A. 14.

2. a. Petitioner was charged with attempted first degree murder and first degree assault. At trial, petitioner took the stand and argued that he acted in self-defense. He invoked his marital privilege under state law to prevent Sylvia from testifying against him. J.A. 3.[1]

The State sought to offer Sylvia's second tape-recorded confession in its case-in-chief as evidence rebutting petitioner's claim of self-defense. Petitioner objected, arguing that admission of the statement would violate his rights under the Confrontation Clause. The trial court overruled petitioner's objection and admitted Sylvia's second statement. The State also introduced Sylvia's first statement for the non-hearsay pur-

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[1] Under Washington law, a spouse can prevent the other spouse from testifying by declining to consent to the testimony. See J.A. 4, 6, 22.

pose of showing that petitioner and Sylvia initially lied to officers. The jury ultimately found petitioner guilty on the assault charge. J.A. 3-4, 11-12.

b. The Washington Court of Appeals reversed, concluding that admission of Sylvia's second statement violated the Confrontation Clause. J.A. 20-37. The court rejected the State's argument that the similarity between petitioner and Sylvia's second statements rendered Sylvia's confession sufficiently reliable to permit its admission. In the court's view, the statements "differ regarding whether Lee was armed when [petitioner] stabbed him," in that petitioner's statement "asserts that Lee may have had something in his hand" whereas Sylvia's statement "has Lee grabbing for something only after he has been stabbed." J.A. 32.

c. The Supreme Court of Washington reversed and reinstated the jury verdict. J.A. 2-19. The court explained that, "[b]ecause a codefendant's confession is presumed unreliable, the statement must either meet a firmly rooted exception to the hearsay rule or provide some indicia of reliability, such as interlocking with the defendant's own confession." J.A. 15 (footnotes omitted). The court concluded that petitioner and Sylvia's second statements "overlap[ped]" and were not "contradictory," J.A. 17, because both statements "indicate that Lee was possibly grabbing for a weapon, but * * * are equally unsure when this event may have taken place," J.A. 18. "Because [the] statements are virtually identical," the court reasoned, "admission of Sylvia's statement satisfies the requirement of reliability under the confrontation clause." J.A. 18-19 (emphasis omitted).



## SUMMARY OF ARGUMENT

This Court's current approach to determining the admissibility of an out-of-court statement under the Confrontation Clause presupposes that the Clause restricts the admissibility of any out-of-court statement offered as hearsay, that is, to prove the truth of the matter asserted. See *Ohio* v. *Roberts*, 448 U.S. 56, 66 (1980). That framework should be reconsidered. The Confrontation Clause should be confined to statements that are testimonial in nature, such as former testimony, affidavits, or confessions to law enforcement officers.

That understanding accords with the constitutional text, which grants the accused a right to confront the "witnesses against" him. That language is most naturally read as addressed to individuals who give formal testimony or its functional equivalent. Restricting the Confrontation Clause to testimonial hearsay also accords with the historical roots of the confrontation right, which was established to end the practice of obtaining criminal convictions through admission of *ex parte* affidavits untested by cross-examination. Limiting the reach of the Confrontation Clause to testimonial hearsay would preserve its role in controlling the admissibility of the types of statements at issue in the vast majority of this Court's decisions applying the Clause.

Petitioner errs in contending that, if the Court restricts the reach of the Confrontation Clause to testimonial hearsay, the Clause should be construed to impose a per se rule barring admission of such statements. From its first decisions applying the Confrontation Clause, the Court has refused to adopt a categorical ban on admissibility, and has recognized that the

right of confrontation must give way when necessary to advance the reliability of the fact-finding process. In circumstances in which testimonial hearsay carries inherent guarantees of reliability and the declarant is unavailable to testify at trial, preventing the fact-finder from hearing the out-of-court statement would subvert the truth-seeking purpose of the Confrontation Clause. Moreover, because a finding of reliability presumes that cross-examination would be of marginal utility, admission of the out-of-court statement does not infringe the defendant's protected interests. This Court has held that other Sixth Amendment rights must yield on occasion in service of the objective of promoting reliability in the outcome of criminal trials. The Court should construe the right of confrontation no differently.

## ARGUMENT

### THE CONFRONTATION CLAUSE DOES NOT IMPOSE A CATEGORICAL PROHIBITION AGAINST ADMISSION OF THE OUT-OF-COURT TESTIMONIAL STATEMENTS OF AN UNAVAILABLE WITNESS

The Confrontation Clause guarantees a criminal defendant the right "to be confronted with the witnesses against him." U.S. Const. Amend. VI. In *Ohio* v. *Roberts*, 448 U.S. 56 (1980), this Court formulated a "general approach" to Confrontation Clause review of hearsay statements. *Id.* at 65.[2] Under that approach:

> [W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable.

[2] The Confrontation Clause imposes no restrictions against the admission of out-of-court statements for non-hearsay purposes. See *Tennessee* v. *Street*, 471 U.S. 409 (1985).



> Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

448 U.S. at 66; see, *e.g.*, *Lilly* v. *Virginia*, 527 U.S. 116, 124-125 (1999) (plurality opinion); *Idaho* v. *Wright*, 497 U.S. 805, 814-815 (1990); *Bourjaily* v. *United States*, 483 U.S. 171, 182-183 (1987). In this case, the Supreme Court of Washington, applying the *Roberts* framework, assessed whether Sylvia's second "statement contains a sufficient indicia of reliability to satisfy the confrontation clause." J.A. 13.

Petitioner asserts that the Confrontation Clause precludes any such inquiry into reliability, by erecting a categorical bar against the admission of "testimonial" hearsay such as depositions, prior testimony, or confessions to law enforcement officers. That argument has two elements. First, petitioner contends that the Confrontation Clause pertains solely to out-of-court statements that are testimonial in nature, because a person who makes a non-testimonial statement is not acting as a "witness against" the defendant within the meaning of the Clause. Second, petitioner contends that, as to testimonial statements, the Confrontation Clause establishes an absolute rule of inadmissibility, even if the statements are reliable and there is no other way to obtain the witness's testimony.

The government agrees that the term "witnesses against" in the Confrontation Clause pertains solely to live witnesses and to out-of-court declarants who provide the functional equivalent of testimony. The gov-

ernment made essentially the same submission as amicus curiae in *White* v. *Illinois*, 502 U.S. 346 (1992), which involved a Confrontation Clause challenge to the admission of certain non-testimonial hearsay. Although the Court rejected that submission (see *id.* at 352-353), the government renews it in this case in view of the Court's grant of certiorari on the question whether the *Roberts* framework warrants reconsideration.

The government parts company with petitioner on the second element of his argument. The suggestion that the Confrontation Clause imposes a per se bar against the admission of testimonial hearsay is inconsistent with numerous decisions of this Court confirming that the confrontation right is not absolute, with the basic purpose of the Confrontation Clause to promote reliability and accuracy in criminal trials, and with the approach of this Court in other Sixth Amendment contexts. Accordingly, the Washington Supreme Court correctly declined to rule that Sylvia's tape-recorded confession was per se inadmissible.

### A. The Confrontation Clause Governs The Admissibility Of Out-Of-Court Statements Only When The Statements Are Testimonial In Nature

The assumption in *Roberts* that all hearsay is subject to scrutiny under the Confrontation Clause appears born of a view that the Confrontation Clause accommodates only two polar interpretations—one that would confine the term "witnesses against" to persons who actually testify at trial, and the other that would construe those words to encompass any hearsay declarant whose statement is offered at trial. See *Dutton* v. *Evans*, 400 U.S. 74, 93-100 (1970) (Harlan, J., concurring); *California* v. *Green*, 399 U.S. 149, 172-189 (1970) (Harlan, J., concurring). But the language, viewed in historical



context, supports an intermediate interpretation, under which the Clause applies to those individuals who provide in-court testimony or its functional equivalent —*i.e.*, affidavits, depositions, prior testimony, or formal statements to law enforcement officers, including the accomplice confession at issue in this case.

#### *1. A declarant acts as a "witness against" the defendant within the meaning of the Confrontation Clause when giving testimony or its equivalent*

By its terms, the Confrontation Clause pertains only to statements made by "witnesses against" a defendant. At the time the Sixth Amendment was adopted, as now, a "witness" was understood to be "one who gives testimony" or "testifies"—that is, "[i]n *judicial proceedings*, [one who] make[s] a solemn declaration under oath, for the purpose of establishing or making proof of some fact to a court." *Maryland* v. *Craig*, 497 U.S. 836, 864 (1990) (Scalia, J., dissenting) (quoting 2 N. Webster, *An American Dictionary of the English Language* 113 (1828)).

The word "witness," in the abstract, can also refer to any person who observed an event. But that is not the sense in which the term is used in the Sixth Amendment. Persons who merely observe matters pertinent to a criminal prosecution do not become "witnesses against" the defendant unless and until they convey their observations in the form of testimony or its functional equivalent. See *White*, 502 U.S. at 360 (Thomas, J., concurring in part and concurring in the judgment) (quoting *Craig*, 497 U.S. at 864-865 (Scalia, J., dissenting)). Cf. *United States* v. *Hubbell*, 530 U.S. 27, 34 (2000) ("The word 'witness' in the constitutional text [of the Fifth Amendment privilege against com-

pelled self-incrimination] limits the relevant category of compelled incriminating communications to those that are 'testimonial' in character.").

Indeed, the law of evidence authorizes the admission of certain non-testimonial declarations, such as excited utterances, dying declarations, and co-conspirator statements, precisely because they are given under circumstances fundamentally different from those surrounding testimony by a "witness." Such statements are unlikely to be influenced by the declarant's calculation of their implications for a future trial. See *Wright*, 497 U.S. at 820. As a result, they are not made in the declarant's capacity as a "witness" for purposes of the Sixth Amendment.

***2. The historical basis of the right of confrontation supports limiting the Confrontation Clause to testimonial hearsay***

a. Interpreting the Confrontation Clause to apply solely to testimonial hearsay is consistent with the Clause's historical roots. Although the concept of confrontation dates to Roman times (see *Coy* v. *Iowa*, 487 U.S. 1012, 1015-1016 (1988)), the common-law right to confrontation first emerged only in the 16th century. Juries rarely heard witnesses before that time, instead obtaining information "by consulting informed persons not called into court." 5 J. Wigmore, *Evidence* § 1364, at 13 (Chadbourne rev. ed. 1974); see D. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. Pub. L. 381, 386-387 (1959). By the end of the 16th century, it had become common for the Crown to offer evidence in criminal proceedings, 9 W. Holdsworth, *History of the English Law* 224 (1926), but still not through presentation of live testimony.



A trial was preceded by an investigation conducted by examining magistrates, who interrogated the prisoner, any accomplices, and other persons with relevant information. See 1 J. Stephen, *A History of the Criminal Law of England* 221, 325 (1883). The prisoner had no right to be present during those pre-trial examinations. *Id.* at 221. The ensuing trial consisted principally of the presentation of argument between the prisoner and the prosecutor. 9 W. Holdsworth, *supra*, at 225; see 1 J. Stephen, *supra*, at 325-326. There was no requirement for the prosecution to rely on live testimony. To the contrary, in courts of common law, "[t]he proof was usually given by reading depositions, confessions of accomplices, letters, and the like; and this occasioned frequent demands by the prisoner to have his 'accusers,' *i.e.*, the witnesses against him, brought before him face to face." 1 J. Stephen, *supra*, at 326; see 9 W. Holdsworth, *supra*, at 228. In the Star Chamber, similarly, "[t]he evidence of witnesses was given upon affidavit." 1 J. Stephen, *supra*, at 338.[3]

b. The right of confrontation emerged to put an end to such practices. Although it is uncertain precisely when the right was formally recognized, the practice of requiring the introduction of testimony through live witnesses rather than depositions and affidavits was well established by the mid-1600s. See D. Pollitt, *supra*, 8 J. Pub. L. at 389-390; 5 J. Wigmore, *supra*,

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[3] The trial of Sir Walter Raleigh for treason in 1603 presents a notorious example. The crucial evidence against Raleigh included the deposition of one Cobham as well as a letter later written by Cobham, both of which implicated Raleigh in a plot to seize the throne. Raleigh had obtained a written retraction from Cobham and believed that Cobham would testify in his favor at trial. The court nevertheless rejected Raleigh's demand that Cobham be called as a witness. See D. Pollitt, *supra*, 8 J. Pub. L. at 388-389.

§ 1364, at 23 n.47. In this country, a number of state constitutions adopted after the Declaration of Independence recognized a right of confrontation.[4] The Sixth Amendment's Confrontation Clause appears patterned after those provisions.

The history of the Confrontation Clause thus supports Justice Story's observation that the Clause simply codified the common-law right that had been recognized in England, and "follow[ed] out the established course of the common law in all trials for crimes." J. Story, *Commentaries on the Constitution of the United States* 664 (1833). This Court has drawn the same conclusion:

> The right of confrontation did not originate with the provision of the Sixth Amendment, but was a common-law right having recognized exceptions. The purpose of that provision, this Court has often said, is to continue and preserve that right, and not to broaden it or disturb the exceptions.

*Salinger* v. *United States*, 272 U.S. 542, 548 (1926); accord, *Mattox* v. *United States*, 156 U.S. 237, 243 (1895).

***3. The assumption in* Roberts *that the Confrontation Clause is coextensive with the hearsay rules is unsupported by the evolution of hearsay law and the confrontation right***

a. The right of confrontation is a feature of criminal procedure intended to benefit criminal defendants. The hearsay rule, by contrast, is a feature of evidence law applicable to all litigants in both civil and criminal

[4] See 1 B. Schwartz, *The Bill of Rights: A Documentary History* 235, 265, 278, 282, 287, 323, 342, 377 (1971) (Va., Pa., Del., Md., N.C., Vt., Mass., N.H.); D. Pollitt, *supra*, 8 J. Pub. L. at 397-399.



proceedings. The "appreciation of the impropriety of using hearsay statements" took increasing hold in England during the 17th century; and by the early 18th century, the general prohibition against admitting hearsay declarations "receive[d] a fairly constant enforcement." 5 J. Wigmore, *supra*, § 1364, at 18. From the outset, however, the hearsay rule was subject to well-recognized (and enduring) exceptions.[5] There is "little if any indication in the historical record that the exceptions to the hearsay rule were understood to be limited by the simultaneously evolving common-law right of confrontation." *White*, 502 U.S. at 362 (Thomas, J., concurring in part and concurring in the judgment).

b. The decisions of this Court and other courts before *Roberts* did not support the notion that the Confrontation Clause regulates the admissibility of all hearsay declarations. The development of the hearsay rule in state and federal decisions has been marked by the recognition of exceptions authorizing the admission of out-of-court statements regardless of the declarant's availability. Before the Confrontation Clause applied to the States as incorporated through the Fourteenth Amendment, see *Pointer* v. *Texas*, 380 U.S. 400, 403-

[5] At least the following exceptions had taken shape by the late 18th century: dying declarations, regularly kept records, co-conspirator declarations, evidence of pedigree and family history, and various kinds of reputation evidence. See *Patton* v. *Freeman*, 1 N.J.L. 113, 115 (N.J. 1791) (co-conspirator declarations); 5 J. Wigmore, *supra*, § 1430, at 275 (dying declarations); *id.* § 1518, at 426-428 (regularly kept records); *id.* § 1476, at 350 (declarations against interest by deceased persons); *id.* § 1476, at 352-358 (statements of fact against penal interest); *id.* § 1480, at 363 (pedigree and family history); *id.* § 1580, at 544 (reputation evidence); 3 J. Wigmore, *supra*, § 735, at 78-84 (past recollection recorded). See also 3 W. Blackstone, *Commentaries on the Law of England* 368 (1768).

406 (1965), the constitution of virtually every State contained a provision substantially equivalent to the Clause. 5 J. Wigmore, *supra*, § 1397, at 155-158 n.1. Many state decisions had rejected claims that the admission of out-of-court statements under exceptions to the hearsay rule violated those state constitutional provisions. See *id.* § 1397, at 159-162.

Until *Roberts*, this Court's cases likewise provided no basis for such a contention. All but two of the Court's decisions applying the Confrontation Clause to hearsay declarations involved prior testimony or confessions—statements functionally equivalent to those that fueled recognition of the common-law right to confrontation.[6] The remaining two decisions held that the admission of statements by co-conspirators in furtherance of the conspiracy did not violate the Confrontation Clause.[7]

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[6] See *Reynolds* v. *United States*, 98 U.S. 145, 158-161 (1878) (testimony at a prior trial); *Mattox*, 156 U.S. at 240-244 (same); *Motes* v. *United States*, 178 U.S. 458, 471-474 (1900) (testimony at "preliminary trial"); *Pointer* v. *Texas*, 380 U.S. at 406-408 (preliminary hearing testimony); *Douglas* v. *Alabama*, 380 U.S. 415, 418-420 (1965) (co-defendant's confession to police); *Brookhart* v. *Janis*, 384 U.S. 1, 4 (1966) (same); *Barber* v. *Page*, 390 U.S. 719, 722-725 (1968) (preliminary hearing testimony); *Berger* v. *California*, 393 U.S. 314 (1969) (same); *Bruton* v. *United States*, 391 U.S. 123, 126-128 & n.3 (1968) (codefendant's confession); *Roberts* v. *Russell*, 392 U.S. 293 (1968) (same); *Green*, *supra* (preliminary hearing testimony and statement to police officer); *Mancusi* v. *Stubbs*, 408 U.S. 204, 213-216 (1972) (prior testimony). See also *Robertson* v. *Baldwin*, 165 U.S. 275, 282 (1897); *Kirby* v. *United States*, 174 U.S. 47, 54-61 (1899); *Dowdell* v. *United States*, 221 U.S. 325, 329-330 (1911); *Diaz* v. *United States*, 223 U.S. 442, 449-452 (1912); *Snyder* v. *Massachusetts*, 291 U.S. 97, 107 (1934); *Bridges* v. *Wixon*, 326 U.S. 135, 153-154 (1945).

[7] *Dutton*, 400 U.S. at 74; *Delaney* v. *United States*, 263 U.S. 586, 590 (1924).



Accordingly, nothing in this Court's cases suggested that the Confrontation Clause was applicable to all out-of-court statements.

The view that the Confrontation Clause limits the admissibility of *all* hearsay gained currency in this Court with the "general approach" adopted in *Roberts*, 448 U.S. at 65. The hearsay at issue there, however, as in many of the Court's previous Confrontation Clause cases, was the preliminary hearing testimony of a witness who could not be found at the time of trial. The Court upheld admission of the testimony because it had been "tested with the equivalent of significant cross-examination" and the witness was unavailable to give testimony at trial. *Id.* at 70, 77. The facts of *Roberts* therefore did not require formulation of a test governing the admissibility of out-of court statements other than the kind to which the Confrontation Clause had long been applied. See, *e.g.*, *Mattox*, 156 U.S. at 242 244. The Court observed that "[t]he historical evidence leaves little doubt * * * that the Clause was intended to exclude *some* hearsay," 448 U.S. at 63 (emphasis added), but articulated an approach that reached *all* hearsay, *id.* at 65-66.

c. The *Roberts* framework has been regularly invoked in subsequent cases raising Confrontation Clause challenges, but for the most part, as in *Roberts*, without considering whether its reach squares with the term "witnesses against" in the text of the Clause. See *Lilly*, 527 U.S. at 124-125 (plurality opinion); *Wright*, 497 U.S. at 814-815; *Bourjaily*, 483 U.S. at 181-184; *Lee* v. *Illinois*, 476 U.S. 530, 543 (1986); *United States* v. *Inadi*, 475 U.S. 387, 392-394 (1986).[8] The sole exception

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[8] *Lilly* and *Lee* involved accomplice statements to the police, and *Bourjaily* and *Inadi* involved co-conspirator statements. The

is *White* v. *Illinois*, *supra*, in which the Court rejected the argument of the United States as amicus curiae that the words "witnesses against" limit the Confrontation Clause to testimonial hearsay. 502 U.S. at 352-353. The Court reasoned that construing the Clause in that manner would "virtually eliminate its role in restricting the admission of hearsay testimony." *Id.* at 352; see *Lilly*, 527 U.S. at 124 (plurality opinion).

Excluding non-testimonial hearsay from the reach of the Confrontation Clause, however, would leave wholly intact the role of the Clause in controlling the admission of former testimony and testimonial statements to police by accomplices and witnesses—precisely the type of hearsay at issue in the vast majority of the Court's Confrontation Clause decisions addressing the admissibility of out-of-court statements. See notes 6-8, *supra*. The suggested approach thus would not affect the holding in several of those cases that the admission of testimonial hearsay violated the Clause.[9] By

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only case after *Roberts* in which the Court arguably applied the framework to exclude non-testimonial hearsay is *Wright*. There, however, the Court did not address whether the child declarant was acting as a witness when she made the excluded statements to a pediatrician. Moreover, the questioning occurred after the declarant had been taken into custody by police, and the state court's characterization of the questioning suggests that it was designed to develop evidence for a criminal case. See 497 U.S. at 813.

[9] See *Motes*, 178 U.S. at 471-474; *Pointer*, 380 U.S. at 406-408; *Douglas*, 380 U.S. at 418-420; *Brookhart*, 384 U.S. at 4; *Barber*, 390 U.S. at 722-725; *Bruton*, 391 U.S. at 126-128; *Roberts* v. *Russell*, *supra*; *Lee*, 476 U.S. at 544-546; *Lilly*, 527 U.S. at 139. Likewise, the federal courts of appeals have held that the admission of particular testimonial hearsay violated the defendant's confrontation rights. See, *e.g.*, *Cook* v. *McKune*, 323 F.3d 825 (10th Cir. 2003); *Padilla* v. *Terhune*, 309 F.3d 614, 617-618 (9th Cir. 2002); *Ryan* v. *Miller*, 303 F.3d 231 (2d Cir. 2002); *Calvert* v. *Wilson*, 288 F.3d 823



contrast, with the arguable exception of *Wright* (see note 8, *supra*), the Court has yet to find any violation of the Clause in the admission of non-testimonial hearsay. For those reasons, the Court should reconsider its rejection in *White* of an approach confining Confrontation Clause review to hearsay that constitutes testimony or its functional equivalent.

**B. The Confrontation Clause Does Not Bar The Admission Of Testimonial Hearsay When The Witness Is Unavailable To Testify And The Statement Is Inherently Reliable**

Petitioner acknowledges that, if this Court continues to apply the Confrontation Clause to *all* hearsay statements, the Clause cannot plausibly be read to establish an absolute rule of inadmissibility. See Pet. Br. 42-50. Any such approach "would abrogate virtually every hearsay exception." *Roberts*, 448 U.S. at 63. The Confrontation Clause could no more be read to impose a per se rule of inadmissibility if the Court were (correctly) to confine the Clause to testimonial hearsay. The language on which that interpretation rests—"witnesses against"—speaks solely to the type of statements encompassed by the Clause, not to whether the Clause categorically bars the admission of those statements.

Petitioner relies on language providing that the accused "shall enjoy the right" to confront adverse witnesses, U.S. Const. Amend. VI, and contends (Pet. Br. 34-35) that the right is "unconditional" because the terms admit of "no qualifications or exceptions." That argument lacks merit. This Court has consistently held

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(6th Cir. 2002); *United States* v. *Westmoreland*, 240 F.3d 618, 627 (7th Cir. 2001); *McCandless* v. *Vaughn*, 172 F.3d 255, 264-270 (3d Cir. 1999).

that the right of confrontation, like other rights established by the Sixth Amendment, must give way when necessary to vindicate the overriding interest in promoting reliability and accuracy in criminal trials.

***1. The Court has rejected a categorical rule when construing the right of confrontation and other rights protected by the Sixth Amendment***

a. This Court has made clear, both before and after *Roberts*, that "the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers* v. *Mississippi*, 410 U.S. 284, 295 (1973). Consequently, rather than adopting a categorical rule of inadmissibility, the Court has "attempted to harmonize the goal of the Clause—placing limits on the kind of evidence that may be received against a defendant—with a societal interest in accurate factfinding, which may require consideration of out-of-court statements." *Bourjaily*, 483 U.S. at 182.

Indeed, the Court explained in one of its earliest decisions applying the Confrontation Clause that, while there "is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards," "general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case." *Mattox*, 156 U.S. at 243. The Court has not wavered from that understanding. See, *e.g.*, *Craig*, 497 U.S. at 847 ("[T]he [Confrontation] Clause permits, where necessary, the admission of certain hearsay statements against a defendant despite the defendant's inability to confront the declarant at trial."); *Snyder* v. *Massachusetts*, 291



U.S. 97, 107 (1934) ("[T]he privilege of confrontation [has not] at any time been without exceptions," and those exceptions "are not even static, but may be enlarged from time to time."). Simply put, the "rights conferred by the Confrontation Clause are not absolute, and may give way to other important interests." *Coy*, 487 U.S. at 1020.[10]

*Maryland* v. *Craig*, *supra*, confirms the Court's continued rejection of a categorical approach. That case involved the "core" right guaranteed by the Confrontation Clause, that of "face-to-face confrontation" of an adverse witness. 497 U.S. at 847 (quoting *Green*, 399 U.S. at 157). The question was whether a State could permit the testimony of an alleged child abuse victim by one-way closed circuit television when found necessary to protect the child from the trauma of a face-to-face encounter with the defendant. The Court reiterated that the confrontation right is "not absolute," and held that the defendant may be denied face-to-face confrontation where "necessary to further an important public policy" and "where the reliability of the testimony is otherwise assured." *Id.* at 850. The Court thus concluded that the State's interest in protecting child abuse victims from emotional trauma "may be sufficiently important" in certain cases "to outweigh * * * a defendant's right to face his or her accusers in court." *Id.* at 853; see *id.* at 857.

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[10] Petitioner's argument for a categorical approach to the right of confrontation is also inconsistent with the recognition that trial judges "retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on * * * cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 679 (1986).

b. Petitioner's call for a categorical rule of inadmissibility under the Confrontation Clause is incompatible with the Court's approach when construing other procedural rights secured by the Sixth Amendment. See *Craig*, 497 U.S. at 850 (reconciling interpretation of Confrontation Clause with decisions construing "other Sixth Amendment rights"). For instance, the Court's application of the Sixth Amendment right to counsel is grounded in the understanding that the "right has been accorded * * * 'not for its own sake,'" *Mickens* v. *Taylor*, 535 U.S. 162, 166 (2002) (quoting *United States* v. *Cronic*, 466 U.S. 648, 658 (1984)), but for its implications for the reliability of criminal trials. Accordingly, the right is not absolute in all contexts. In *Perry* v. *Leeke*, 488 U.S. 272 (1989), the Court found no constitutional violation when the defendant was denied access to his counsel during a recess between his direct testimony and cross-examination. The Court explained that "cross-examination of a witness who is uncounseled between direct examination and cross-examination is more likely to lead to the discovery of truth than is cross-examination of a witness who is given time to pause and consult with his attorney." *Id.* at 282.

Of particular significance, the Court has declined to adopt a categorical approach when interpreting the right to obtain the testimony of a favorable witness under the Compulsory Process Clause—the complement to the right to cross-examine an adverse witness under the Confrontation Clause. In *Taylor* v. *Illinois*, 484 U.S. 400 (1988), the Court rejected a Compulsory Process Clause challenge to the exclusion of a witness's testimony as a sanction for failing to identify the witness in a pretrial discovery request. The Court explained that "the mere invocation of [the compulsory process] right cannot automatically and invariably



outweigh countervailing public interests." *Id.* at 414. The Court emphasized that those interests include the "integrity of the adversary process, which depends both on the presentation of reliable evidence and the rejection of unreliable evidence," and "the potential prejudice to the truth-determining function of the trial process." *Id.* at 414-415. The requirement to identify witnesses in pretrial discovery, the Court reasoned, serves to "minimize the risk that fabricated testimony will be believed," *id.* at 413, and protects against undermining "the effectiveness of cross-examination and the ability to adduce rebuttal evidence," *id.* at 415. See also *Michigan* v. *Lucas*, 500 U.S. 145 (1991) (rejecting challenge under Compulsory Process Clause to refusal of trial court to permit rape defendant to testify about his past sexual relationship with the victim as sanction for failing to comply with a state statute requiring pre-trial notice of such testimony).

***2. A categorical rule of inadmissibility would conflict with the objective of the Confrontation Clause to promote the truth-seeking function of criminal trials***

a. The Court has "interpreted the Confrontation Clause in a manner sensitive to its purposes and sensitive to the necessities of trial and the adversary process." *Craig*, 497 U.S. at 849. And the Court has made clear that the right of cross-examination is "more than a desirable rule of trial procedure." *Chambers*, 410 U.S. at 295. Rather, the "mission" of the Confrontation Clause is "to advance 'the accuracy of the truth-determining process in criminal trials.'" *Tennessee* v. *Street*, 471 U.S. 409, 415 (1985) (quoting *Dutton*, 400 U.S. at 89); see *Craig*, 497 U.S. at 846; *Inadi*, 475

U.S. at 396. The "right to cross-examination, protected by the Confrontation Clause, thus is essentially a 'functional' right designed to promote reliability in the truth-finding functions of a criminal trial." *Kentucky* v. *Stincer*, 482 U.S. 730, 737 (1987); see *Lee*, 476 U.S. at 540. Cross-examination advances the truth-seeking function by subjecting the evidence against a defendant "to rigorous testing in the context of an adversary proceeding," thus helping to "ensure [its] reliability." *Craig*, 497 U.S. at 845; see *Lilly*, 527 U.S. at 123-124 (plurality opinion).

Accordingly, both the Confrontation Clause and evidentiary rules allowing for the admission of reliable hearsay serve the same underlying purpose: promoting the accuracy and reliability of the fact-finding process at trial. When the hearsay declarant is unavailable, cross-examination is not an option; instead, the choice is between admitting the hearsay upon a sufficient showing of its reliability or excluding the statement altogether regardless of its probative value. In that situation, admitting reliable hearsay advances the purposes of the Confrontation Clause. Cf. *Inadi*, 475 U.S. at 396 (stating that the admission of the statements of co-conspirators, regardless of the opportunity for cross-examination, "actually furthers the Confrontation Clause's very mission, which is to advance the accuracy of the truth-determining process") (internal quotation marks omitted). Because confrontation rights occasionally must give way even in the service of interests that may compromise the Clause's truth-seeking function, see *Craig*, 497 U.S. at 846-850, 856-857, it follows that those rights also must occasionally give way where the admission of evidence promotes the reliability of the trial.



b. Conversely, the categorical approach urged by petitioner, by excluding from trial even the most reliable and probative testimonial hearsay, would unduly encroach on the truth-seeking function and the associated interest in convicting those guilty of crime. See *Mattox*, 156 U.S. at 243-244 (explaining that an absolute rule of exclusion would produce "a manifest failure of justice" in the case by allowing a guilty defendant to go "scot free" despite the reliability of the hearsay testimony at issue). Moreover, when the out-of-court statement is found to be inherently reliable, admission of the evidence, even without an opportunity for cross-examination, does not infringe the values that the Confrontation Clause is designed to further.[11]

Under this Court's decisions, a finding of inherent reliability requires that "the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility" —that is, that cross-examination could not plausibly undermine the reliability of the statement. *Wright*, 497 U.S. at 820. As Wigmore explained:

> The theory of the hearsay rule * * * is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought

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[11] In *Wright*, the Court held that, "[t]o be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its *inherent* trustworthiness, not by reference to other evidence at trial." 497 U.S. at 822 (emphasis added). The Court accordingly rejected the conclusion that corroborating evidence could be used "to support a hearsay statement's 'particularized guarantees of trustworthiness,'" *id.* at 823, and instead, directed attention to "the totality of the circumstances that surround the making of the statement and that render the declarant particularly worthy of belief," *id.* at 820.

> to light and exposed, if they exist, by the test of cross-examination. But this test or security may in a given instance be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation.

5 J. Wigmore, *supra*, § 1420, at 251 (quoted in *Wright*, 497 U.S. at 819); see *Dutton*, 400 U.S. at 89 (plurality opinion) ("[T]he possibility that cross-examination of Williams could conceivably have shown the jury that the statement, though made, might have been unreliable was wholly unreal."). Where cross-examination would be "a work of supererogation," refusing admission of the hearsay statement in the name of the Confrontation Clause would subvert the "Clause's very mission—to advance the accuracy of the truth-determining process in criminal trials." *Street*, 471 U.S. at 415 (internal quotation marks omitted); cf. *White*, 502 U.S. at 356-357 ("To exclude such probative statements under the strictures of the Confrontation Clause would be the height of wrongheadedness, given that the Confrontation Clause has as a basic purpose the promotion of the integrity of the factfinding process.") (internal quotation marks omitted).

c. Testimonial hearsay, like all other hearsay, can be sufficiently reliable in certain situations to warrant its admission into evidence. This Court has frequently upheld the admission of testimonial hearsay that comes in the form of statements in a preliminary hearing or previous trial. See, *e.g.*, *Roberts*, 448 U.S. at 70-73; *Mancusi* v. *Stubbs*, 408 U.S. 204, 213- 216 (1972); *Green*, 399 U.S. at 165-166; *Mattox*, 156 U.S. at 242-244. The Court has explained that result not on the basis that



the confrontation requirement was substantially satisfied by the earlier opportunity to conduct cross-examination, but instead on the basis of the resulting reliability of the statement: "Since there was an adequate opportunity to cross-examine [the witness], and counsel * * * availed himself of that opportunity, the transcript * * * bore sufficient 'indicia of reliability' and afforded 'the trier of fact a satisfactory basis for evaluating the truth of the prior statement.'" *Mancusi*, 408 U.S. at 216 (quoting *Dutton*, 400 U.S. at 89); see *Roberts*, 448 U.S. at 73.

Other decisions of the Court leave no doubt that testimonial hearsay can carry sufficient indicia of reliability to justify admission even absent a previous opportunity to cross-examine the declarant. In *Lee* v. *Illinois*, *supra*, for example, although the Court found that the presumption of unreliability that attaches to accomplice confessions incriminating the accused had not been rebutted in the circumstances, 476 U.S. at 544, the Court specifically "agree[d] that the presumption may be rebutted" in certain situations, *id.* at 543. In *Lilly* v. *Virginia*, *supra*, similarly, the plurality found that the accomplice confession at issue failed to manifest sufficient indicia of reliability, 527 U.S. at 137-139, but confirmed that such confessions are admissible if "the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility," *id.* at 136 (quoting *Wright*, 497 U.S. at 820); see *id.* at 134-135 n.5. Four other Justices agreed that the Confrontation Clause imposes no "blanket ban on the government's use of accomplice statements that incriminate a defendant." *Id.* at 143 (Thomas, J., concurring in part and concurring in the judgment); *id.* at 147-148 (Rehnquist,

C.J., concurring in the judgment, joined by O'Connor and Kennedy, JJ.).

In recognizing that even accomplice confessions that inculpate the defendant—a "presumptively suspect" form of hearsay, *Lee*, 476 U.S. at 541—can be found sufficiently reliable to warrant admissibility, the Court necessarily established that there is no cause for applying a per se rule of inadmissibility against testimonial hearsay. Indeed, in other contexts, testimonial hearsay frequently will be far more reliable. For instance, there may often be little reason to question the validity of statements made to officers at the scene by a disinterested bystander who directly observed the commission of a crime and promptly reported it to the police. Even as to accomplice confessions, an accomplice might divulge his own role in a crime without in any way suggesting the involvement of the accused, but in the course of doing so reveal details about the time and place of the offense that, when combined with other evidence, connect the accused to the scene of the crime. If the accomplice is unavailable to testify at trial, his confession, as entirely against his own self-interest, may be sufficiently reliable to warrant admission to establish the time and place of the offense. The per se exclusion of reliable testimonial hearsay in such circumstances, particularly if critical to the government's case, would jeopardize the accuracy and integrity of the fact-finding process.[12]

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[12] The admission of a particularly reliable hearsay statement does not deprive the defendant of all opportunity to challenge the statement. For example, under Federal Rule of Evidence 806, if hearsay is admitted, the credibility of the hearsay declarant "may be attacked * * * by any evidence which would be admissible for those purposes if [the] declarant had testified as a witness." That rule permits the defendant to attempt to cast doubt on the declarant's credibility, motive, memory, or opportunity to observe the events to which the statement relates.



d. None of this is to suggest, of course, that testimonial hearsay may be admitted even where the declarant is available to testify but is not produced for trial. The rule allowing for admission of reliable testimonial hearsay when the declarant is unavailable is one of "necessity." *Roberts*, 448 U.S. at 65. The unavailability of the declarant occasions the need to admit the out-of-court statement to prevent distortion of the truth-seeking process by the exclusion of reliable and probative evidence. See *United States* v. *Scheffer*, 523 U.S. 303, 309 (1998) ("State and Federal Governments unquestionably have a legitimate interest in ensuring that reliable evidence is presented to the trier of fact in a criminal trial."). If the declarant is available to testify, however, there is no need to admit the out-of-court statement in lieu of live testimony subject to cross-examination.

## CONCLUSION

The Court should hold that the Confrontation Clause does not categorically bar the admission of testimonial hearsay.

Respectfully submitted.

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